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United States  
Circuit Court of Appeals

For the Ninth Circuit.

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Transcript of Record.

(IN TWO VOLUMES.)

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FRANK L. TOBEY and RETTA M. TOBEY,  
His Wife, AUGUSTA M. TOBEY and  
WILLIAM L. TOBEY,

Appellants,

vs.

EDWARD C. KILBOURNE et al.,

Appellees.

---

VOLUME I.

(Pages 1 to 336, Inclusive.)

---

Upon Appeal from the United States District Court for  
the District of Oregon.

Filed

JAN 14 1915

F. D. Monckton,  
Clerk.

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*In the District Court of the United States for the  
District of Oregon.*

FRANK L. TOBEY and RETTA M. TOBEY his  
wife, AUGUSTA M. TOBEY, and WILLIAM  
L. TOBEY,

Complainants,

*vs.*

W. E. DE LARM, EDWARD C. KILBOURNE,  
CHARLES A. KILBOURNE, J. ALEXANDER  
WAKEFIELD, CYRUS F. CLAPP, H. E.  
LUTZ, W. J. BURNS, THE EDINBURG AND  
PACIFIC COAST MORTGAGE AGENCY LIM-  
ITED, COLUMBIA RIVER ORCHARDS COM-  
Trustee, a corporation, and THE WASHING-  
TON TRUST COMPANY, of Portland, Oregon,  
Trustee, a corporation, and THE WASHING-  
TON ORCHARD IRRIGATION AND FRUIT  
COMPANY, a corporation,

Defendants.

**[Names and Addresses of Attorneys of Record]***For Appellants—*

A. C. WOODCOCK, E. R. BRYSON, R. S.  
SMITH, JOHN M. WILLIAMS and LOUIS  
E. BEAN, Eugene, Oregon.

*For Appellees—*

C. E. S. WOOD, RICHARD W. MONTAGUE,  
ISAAC D. HUNT, and ERSKINE WOOD,  
Spaulding Building, Portland, Oregon.

---

*In the District Court of the United States for the  
District of Oregon*

March Term, 1912.

BE IT REMEMBERED, That on the 14th day of  
June, 1912, there was duly filed in the District Court  
of the United States for the District of Oregon, a bill  
of complaint, in words and figures as follows, to  
wit:

[Complaint]

*In the District Court of the United States for the  
District of Oregon.*

FRANK L. TOBEY and RETTA M. TOBEY, his  
wife, AUGUSTA M. TOBEY, and WILLIAM  
L. TOBEY,

Complainants,

vs.

W. E. DeLARM, EDWARD C. KILBOURNE,  
CHARLES A. KILBOURNE, J. ALEXAN-  
DER WAKEFIELD, CYRUS F. CLAPP, H.  
E. LUTZ, W. J. BURNS, THE EDINBURG  
and PACIFIC COAST MORTGAGE AGEN-  
CY, LIMITED, COLUMBIA RIVER ORCH-  
ARD COMPANY, A Corporation, OREGON-  
WASHINGTON TRUST COMPANY, OF  
PORTLAND, OREGON, Trustee, a Corpora-  
tion, and THE WASHINGTON ORCHARD  
IRRIGATION AND FRUIT COMPANY, a  
Corporation,

Defendants.

BILL OF COMPLAINT

To the Honorable Judges of the District Court of  
the United States for the District of Oregon:

Your orators herein, Frank L. Tobey, Retta M.  
Tobey, Augusta M. Tobey and William L. Tobey.  
are citizens of the United States and residents and  
citizens of the State of Oregon, and within the above  
named judicial district of the State of Oregon.

## I.

Your orators are informed and believe that the defendant, W. E. DeLarm, was at the time said transaction was entered into, a citizen of the State of Washington, but your orators are informed and believe that he has disappeared and they do not know now where he is.

## II.

Your orators are informed and believe that the defendants Edward C. Kilbourne and Charles A. Kilbourne, are citizens of the State of Washington.

## III.

Your orators are informed and believe that the defendant, J. Alexander Wakefield, is a citizen of the State of Washington.

## IV.

Your orators are informed and believe that the defendant Cyrus F. Clapp is a citizen of the State of Washington.

## V.

That your orators do not know the place of residence of the defendant H. E. Lutz.

## VI.

That your orators are informed and believe that the defendant W. J. Burns is a citizen of the State of Oregon.

## VII.

That your orators are informed and believe that the defendant the Edinburg & Pacific Coast Mortgage Agency, Limited, was at all the times herein al-



leged, and is now, a corporation doing business within the State of Oregon, the place of incorporation being unknown to your orators.

VIII.

That your orators are informed and believe that the Columbia River Orchard Company was at all the times herein alleged, and now is, as far as these orators are informed, a corporation organized under the laws of the State of Washington.

IX.

That your orators are informed and believe that the Oregon-Washington Trust Company was at all the times herein alleged, and is now, as far as your orators are informed, a corporation organized under the laws of the State of Washington, having its principal office and place of business in the City of Portland, Oregon.

X.

That your orators are informed and believe that the Washington Orchard Irrigation & Fruit Company was at all the times herein alleged, and is now, as far as your orators are informed, a corporation organized and existing under the laws of the State of South Dakota.

XI.

That on the 4th day of March A. D. 1911, all of your orators, except the above named Augusta M. Tobey, entered into a certain agreement with the above named defendant W. E. DeLarm, a copy of

which said agreement is hereto annexed, marked exhibit A and made a part hereof.

## XII.

That at the time said agreement was entered into, your orators owned what is denominated in said agreement "a certain wheat ranch located in the County of Gilliam and the State of Oregon, and consisting of about 4,350 acres of land." That said land is generally described in said agreement as being situated in Section 31, Township 1 North Range 21 East; parts of Sections 1 and 12, Township 1 South of Range 22 East; all of Sections 7 and 8, one-half of Section 9, part of Section 3, all of Section 4, part of Section 5 and all of Section 6, Township 1 South of Range 22 East, and known as the Tobey Brothers Ranch.

## XIII.

That in said agreement it was stipulated that in addition to the lands described the parties to said agreement, that is, The Tobey's, should also convey to said W. E. DeLarm all the accessories, tools and thirty-six head of horses and mules in good working condition, to be selected in the manner set forth in said agreement, and all equipment and appurtenances belonging to said ranch, including the growing crop thereon.

## XIV.

That in said agreement it was provided that the purchase price to be paid by said DeLarm was the sum of One Hundred Forty-one Thousand (\$141,-

000.00) Dollars; that said purchase price was to be paid according to said agreement by the payment of One Thousand (\$1,000.00) Dollars at the time the deeds and bills of sale transferring the personal property were delivered, and One Hundred and Forty Thousand (\$140,000.00) Dollars of said purchase price was to be paid by delivering to the second parties to said agreement Series A Columbia River Orchard Company seven per cent twenty year bonds of the par value of One Hundred and Forty Thousand Dollars.

#### XV.

Another provision in said agreement was to the effect that DeLarm, the first party, was to secure for the second parties a loan on the bonds as follows: Three Thousand Dollars at the time of delivery of the title to said agreement, and Three Thousand Dollars on or before April 15, 1911. Said loan to be secured by the bonds described in said agreement at the ratio of Two Hundred Dollars in bonds for each One Hundred Dollars so loaned, interest to be seven per cent, and loan to run until on or before February first, 1912.

#### XVI.

That the ownership of said real property was divided among your orators, some of them owning jointly and some severally, but that the whole transaction was made with all of them jointly, with the idea that the entire tract was treated as being owned by the parties named in said agreement, together

with the said Augusta M. Tobey, and they all acted together and the property was treated both by the said DeLarm and the said Tobey as being owned by them the same as if it had been a joint ownership.

#### XVII.

That afterward at the request of said DeLarm and without any further consideration on the part of the grantee hereinafter named, the said parties to said agreement, together with the said Augusta M. Tobey, made conveyance to one Edward C. Kilbourne as follows:

That on March 15, 1911, Frank L. Tobey and Retta M. Tobey, his wife, executed in favor of said Edward C. Kilbourne and delivered to said W. E. DeLarm, a deed of conveyance to the following described real property, to-wit:

Northwest quarter of Northwest quarter of Section four (4), North half of Section Seven (7); all in Township One (1) South Range Twenty-two (22) East of the Willamette Meridian, containing 371 acres more or less. All of which said real property is situated in the County of Gilliam, State of Oregon.

That said deed was, on the 30th day of March, A. D. 1911, at 10 o'clock A. M. recorded at page 172 in Book W of the Deed Records of Gilliam County, Oregon, copy of which said deed is hereto annexed, marked exhibit B and made a part hereof.

#### XVIII.

That on the 15th day of March, 1911, the said Augusta M. Tobey, at the request of W. E. DeLarm,



executed in favor of said Edward C. Kilbourne, and delivered to said W. E. DeLarm, a deed of conveyance to the following described real property, situated in the County of Gilliam, State of Oregon:

All of lots three and four, five and six of Section Three, and lots one and two, and the South half of the Northeast quarter of Section four, all in Township One South of Range Twenty-two East of the Willamette Meridian, containing in all 343.36 acres, more or less.

Which said deed was, on the 30th day of March A. D. 1911, at 10 o'clock A. M. recorded at page 175, Book W of the Deed Records of said Gilliam County, Oregon, copy of which said deed is hereto annexed, marked exhibit C and made a part hereof.

### XIX.

That on the said 15th day of March, 1911, at the request of said W. E. DeLarm, William L. Tobey, unmarried, executed in favor of said Edward C. Kilbourne, and delivered to said W. E. DeLarm, a deed of conveyance to the following described real property situated in the County of Gilliam, State of Oregon:

Northeast quarter of Section Twelve (12), Township One (1) South of Range Twenty-one (21) East, Lots three (3) and four (4) and the East half of Southwest quarter of Section Seven (7), and Northeast quarter of the Southwest quarter of Section four (4), and East half of the Northwest quarter of

Section four (4) all in Township One (1) South of Range Twenty-two (22) East of the Willamette Meridian, containing altogether 447.35 acres more or less; which said deed was, on the 30th day of March, A. D. 1911, at 10 o'clock A. M. recorded on page 174 Book W of the deed records of Gilliam County, Oregon, a copy of which said deed is hereto annexed, marked exhibit D and made a part hereof.

## XX.

That on the 15th day of March, 1911, said Frank L. Tobey and Retta M. Tobey his wife, and William L. Tobey, unmarried, at the request of said W. E. DeLarm, executed in favor of said Edward C. Kilbourne a deed of conveyance for the following described real property situated in the County of Gilliam, State of Oregon, to-wit:

East half of the northwest quarter and the northwest quarter of northwest quarter, and the east half of southwest quarter; and southwest quarter of southwest quarter of section Thirty-one; Township One North Range Twenty-two East of the Willamette Meridian, east half of east half of section one in township one south range twenty-one east of Willamette Meridian, Southwest quarter of northwest quarter, northwest quarter of southwest quarter; south half of southwest quarter and southeast quarter of section four, northeast quarter of northeast quarter, west half of northeast quarter, northwest quarter and south half of section five, east half and northwest quarter and west half of southwest quar-

ter of section six, southeast quarter of section seven, all of section eight, west half of section nine, all in Township one South Range twenty-two east of the Willamette Meridian, containing altogether 3107.58 acres more or less; which said deed was, on the 30th day of March, 1911, at 10 o'clock A. M. recorded on page 173 of Book W of the Deed Records of said Gilliam County, Oregon, copy of which said deed is hereto annexed, marked exhibit E and made a part hereof.

### XXI.

That the parties named in said agreement as entered into, and being Exhibit A herein, that is the parties of the second part, executed and delivered to said W. E. DeLarm a bill of sale for all of the personal property, equipment, etc., mentioned in said agreement.

### XXII.

That said real property, at the time said agreement was entered into, was of the reasonable value of One Hundred Forty-one Thousand Dollars, and is worth that much and more now.

### XXIII.

That said personal property was, at the time it was turned over as herein alleged, of the value of Thirteen Thousand Five Hundred to Fourteen Thousand Dollars, and would be worth that much and more at the present time if the same could be redelivered to the complainants herein.

### XXIV.

That upon the execution and delivery of said deeds

and the said bill of sale, and the delivery of said personal property, the said W. E. DeLarm caused to be delivered to your orators the bonds mentioned in said original agreement, entered into, being your orators exhibit A, as follows:

14, Five Thousand Dollar Bonds,

120, Five Hundred Dollar Bonds,

40, One Hundred Dollar Bonds,

That other bonds were issued and delivered to your orators to the amount of six thousand dollars for the purpose of securing a loan furnished by said W. E. DeLarm, which will be more fully hereinafter explained;

That the number of said bonds or the par value of the same cannot now be stated, except to state that the total par value of the same was six thousand dollars, making a total of One Hundred Forty Thousand Dollars.

## XXV.

That at the time said deeds were made to said Edward C. Kilbourne the said W. E. DeLarm represented to your orators that the said Edward C. Kilbourne was a friend of his and was associated with him in the business, and for convenience desired to have the deeds made to him instead of to the said W. E. DeLarm.

That the said Edward C. Kilbourne was with the said DeLarm examining the property, and your orators were led to believe, and it was represented to them by the said W. E. DeLarm, that the said Ed-



ward C. Kilbourne was associated with him in the transaction which led to the execution of said deeds.

That these bonds are such bonds as were mentioned in the contract hereto annexed, and marked your orators' exhibit A, being noted by the bonds themselves as well as by said contract, as Series A and being of various denominations as herein set forth.

## XXVI.

That the said W. E. DeLarm was the President of the Columbia River Orchard Company, and as such President had authority to enter into such transactions as said company had a right to enter into.

## XXVII.

That during all the times that the question as to the value of said bonds was considered by your orators and said DeLarm, both individually and as President of the Columbia River Orchard Company, the Company which issued said bonds, it was represented by the said W. E. DeLarm individually and as President of said company that the bonds were worth twice their par value, and the said DeLarm further represented that the Washington Orchard Irrigation and Fruit Company, one of the defendants herein, was amply able to stand good for the guarantee which said company made on said bonds, which said guarantee is as follows, to-wit:

"In consideration of One Dollar, receipt whereof is hereby acknowledged by the Washington Orchard Irrigation and Fruit Company, a company organized and existing under and by virtue of the laws of the

State of South Dakota, having its principal place of business in Seattle, State of Washington, hereby guarantees payment of the principal and interest of the within bond according to the terms and tenor of said bond and the trust agreement mentioned therein."

All of which was duly signed and authenticated by said Washington Orchard Irrigation and Fruit Company.

And attention was called by the said DeLarm to your orators to this provision in the said bonds:

"The payment of the principal and interest of said bonds is secured by mortgages on real estate deeds and other good, valid and solvent securities amounting to one hundred twenty-five (125%) per cent in face value of the sum named herein, deposited with the Oregon Washington Trust Company of Portland, Oregon, trustee, according to the terms of an agreement entered into by and between said trustee and the said Columbia River Orchard Company, which agreement is hereby made a part hereof."

And the said W. E. DeLarm stated that the value of said bonds, instead of being 125% backed by securities and guarantee, they were worth two hundred per cent of the par value, all of which representations were and are false and were known to be false by said W. E. DeLarm and the other defendants herein alleged to be connected with him in said fraud.

## XXVIII.

Your orators allege the truth to be:

That the said W. E. DeLarm, with his associates, including all of the defendants herein, except possibly W. J. Burns, entered into a gigantic scheme to defraud your orators as well as all other persons with whom he and his associates dealt.

### XXIX.

That it is not true, as stated on the face of said bonds, that the principal and interest of said bonds was at any time secured as stated in said bonds, amounting to one hundred and twenty-five per cent as above alleged, or deposited with the Oregon and Washington Trust Company of Portland, Oregon, Trustee, that the statement was false and made for the express purpose of inducing innocent persons, including your orators and those in similar positions, to take the bonds, assuming that the representations on the face of the bonds, as well as those made by DeLarm, in dealing with your orators, as well as other persons, were true. That said bonds never had any value and were at all times, and are now, worthless, and of no value whatever, and the defendants knew the same at all the times herein alleged.

### XXX.

That the defendants, W. E. DeLarm, Edward C. Kilbourne, Charles A. Kilbourne, J. Alexander Wakefield, Cyrus F. Clapp, H. E. Lutz, Columbia River Orchard Company, Oregon Washington Trust Company, Washington Orchard Irrigation and Fruit Company, conspired and confederated together for the purpose of defrauding your orators and other

persons with whom they dealt; that the said defendant W. E. DeLarm dominated and controlled said corporations, made parties defendant hereto, as well as the individuals named herein as defendants, and they were all instruments in his hands or acting with him for the purpose of perpetrating the frauds which culminated in the transactions with which they have been connected with your orators, as well as other persons.

### XXXI.

That the said W. E. DeLarm, through his said confederates, formed the various corporations for the purpose of carrying on said scheme so as to cover up and prevent your orators as well as other persons with whom they dealt, from securing relief on account of said frauds, and that the said Edward C. Kilbourne and Charles A. Kilbourne to whom the said Edward C. Kilbourne conveyed the lands of your orators knew at all times all about the business that was being conducted by the said W. E. DeLarm, and all of the said corporations which are made defendants herein, and knew the whole scheme as well as W. E. DeLarm himself, and they were confederates with him in the business, and when the deeds were made and delivered to the said Edward C. Kilbourne he had knowledge of all the business in which the said W. E. DeLarm was engaged and was not at all an innocent purchaser, and acted with the said W. E. DeLarm to induce your orators to convey the land to him, as a trustee or agent for the said W. E.



DeLarm and his company.

That no consideration at all whatever passed between the said Edward C. Kilbourne and your orators, but the deeds were made to the said Edward C. Kilbourne with the express understanding that he was an agent and trustee of the said W. E. DeLarm with whom the original contract was made and was acting for him. And the said Charles A. Kilbourne knew, at the time said deed was executed and delivered to him, of all the transactions.

### XXXII.

That the defendant Charles A. Kilbourne, on September 27, 1911, as far as the records show in Gilliam County, Oregon, executed and delivered to one J. Alexander Wakefield a certain mortgage amounting to Seventeen Thousand Five Hundred Dollars, which said mortgage is recorded at page 543, Book L, of the Mortgage Records of Gilliam County, Oregon.

That afterwards, on September 28, 1911, and before said mortgage was recorded, the same was assigned by the said Wakefield to Cyrus F. Clapp and H. E. Lutz, the defendants herein, which said assignment is recorded at page 545, Book L, of the Mortgage Records of Gilliam County, Oregon.

### XXXIII.

Your orators say that the said J. Alexander Wakefield, at the time said mortgage was executed, had full knowledge of the transactions and the method of transactions of the defendants herein, as above alleged, including the said W. E. DeLarm, and all

of his associates and confederates, and the said J. Alexander Wakefield was a confederate with them and was in the conspiracy with them to carry out the fraud and the gigantic fraud which they finally did carry out against your orators, as well as against other persons, and that the said mortgage so given to the said J. Alexander Wakefield, was taken by him with all of such knowledge, and as a confederate with W. E. DeLarm and the other defendants herein and that the said Cyrus F. Clapp and H. E. Lutz knew the manner in which the said W. E. DeLarm and his confederates and associates as herein alleged were conducting their business, and knew that it was a fraud, and took the assignment of the mortgage with a large discount, large enough to put the said Cyrus F. Clapp on his guard as to whether the same was a legitimate transaction or a fraud.

#### XXXIV.

That on the 30th day of March, 1911, the said Charles A. Kilbourne executed a certain mortgage to one W. J. Burns on said real property described in this bill of complaint, amounting to Twenty Thousand Dollars, a copy of which said mortgage is hereto annexed, marked exhibit F and made a part hereof, and which said mortgage is recorded at pages 475 and 476, Volume L, Mortgage Records for Gilliam County, Oregon.

That said mortgage was afterwards by the said W. J. Burns transferred to the Edinburg and Pacific Coast Mortgage Agency, Limited.

Your orators say, in reference to said mortgage, that they have no knowledge, information or belief as to the validity of the said mortgage, or as to the knowledge of the said W. J. Burns, or his assent to the fraud, which the mortgagors as alleged herein were perpetrating or endeavoring to perpetrate, and therefore leave the said W. J. Burns or his assigns the Edinburg and Pacific Coast Mortgage Agency, Limited, to their proof.

### XXXV.

Your orators further say that when they entered into the transactions which are alleged herein, they did the same with the utmost good faith, that they transferred everything they owned in the world to the said W. E. DeLarm, and his associates, on the representations of him and his associates as to the value of the bonds which they were securing for their property.

That the property they owned at that time was the result of their life work and they believed what was represented to them as herein alleged, and thought that they were getting value received for their lands.

### XXXVI.

That all of the corporations herein enumerated with which DeLarm was connected, and which he caused to be organized for the purpose of carrying out his fraudulent schemes were at all the times herein alleged, and are now insolvent and not able to respond in damages or otherwise.

## XXXVII.

That the said W. E. DeLarm had a peculiar scheme of having property deeded to one person, or corporation, and having bonds issued by another, and, as shown in the transactions which he entered into and carried out with your orators, he caused the lands to be conveyed to individuals and bonds issued by a corporation which never received the lands at all.

The whole purpose of the scheme being to have an institution issue bonds which had no property or assets to answer for the bonds, and the said W. E. DeLarm and his associates and confederates have worked the same scheme in all transactions which they have had with other persons.

They caused various corporations to be organized for the express purpose of promoting the fraud and the intention was, in the very beginning when they started out to do business, to defraud all persons dealing with them, and steal and take away from them the property they had, without giving any compensation therefor, and all persons who dealt with them, or who were connected with them including all these defendants excepting possibly W. J. Burns and his assignee, knew all about the said transactions, were familiar with the same, acted in conjunction with the said DeLarm and his confederates and associates, being amongst them themselves, and had full knowledge of the method and manner in which the business was being done.



## XXXVIII.

That under the agreement entered into, the original agreement, exhibit A, the said DeLarm was to furnish a loan to the second parties mentioned in said agreement, and said loan was to be secured by the bonds delivered to the second parties in the ratio of Two Dollars to One Dollar. The loan was secured by said W. E. DeLarm, and through him and by him, and through his agents and principals as well, and bonds were put up to secure said loan to the amount of Six Thousand Dollars, but it was provided in said loan that the same was to be paid out of the interest and principal of said bonds; that the said DeLarm and his associates and confederates, have full control over said bonds, and that the personal property delivered to the said DeLarm and his associates was worth more than said loan, and your orators say that said bonds are now in the hands of said W. E. DeLarm, or his associates or confederates, and that the said personal property is worth twice as much as the money which was furnished by the said DeLarm, his associates and confederates, and your orators bring all their bonds, except the bonds which were put up for security of said loan, into court and tender them back to such of the defendants as may be entitled to the same, on the condition that the decree be made in accordance with the prayer made herein, and that said bonds are delivered to the Clerk of the Court along with this Bill of Complaint.

## XXXIX.

That your orators allege that the lands and premises are now planted in crop by the persons having possession of the same, and being, as far as your orators are informed and believe, the said Kilbournes, and it is necessary for the protection of your orators' interest, that the said Kilbourne or whoever may have possession of said premises be enjoined from disposing of said crops during the pendency of this suit.

## XL.

That your orators have no plain, speedy or adequate remedy at law, and are without protection except in the equity department of this Honorable Court.

WHEREFORE, Your orators pray that a temporary injunction issue out of this court, preventing the defendants and each of them from disposing of any of the crop growing on the lands and premises herein described, and from disposing of any of the personal property which your orators turned over to the said defendants during the pendency of this suit.

That your Honors may decree that said defendants and each of them have no interest or estate whatsoever in or to said lands or premises, and that the title of your orators is good and valid.

That the defendants, and each of them, be forever enjoined and restrained from asserting any claim whatever in and to said lands and premises adverse

to your orators, and that the original contract marked Exhibit A and all the deeds of conveyance marked exhibits B, C, D, and E, and the mortgages as set out herein, be set aside and held for naught, and that your orators be declared to be the owners in fee simple of the real property, lands and premises described in this bill of complaint, according to their respective interests as shown in the various deeds noted by said exhibits.

That the defendants who took possession, as herein alleged, of the personal property turned over by your orators be required to return said personal property to your orators, or the value thereof, and for such other and further relief as the equity of the case may require, and to your Honors may seem meet, together with the costs of this suit.

May it please your Honors to grant unto your orators a writ of subpoena directed to the said defendants, and each of them, commanding them on a day certain therein to be named, to appear and answer this bill (but not under oath, answer under oath being hereby waived), and to perform such order and decree in the premises as to the Court may seem meet and as may be required by the principles of equity and good conscience.

WOODCOCK & SMITH,  
Solicitors for Complainants.

EXHIBIT A.

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This agreement, made and entered into this 4th day of March, A. D. 1911, by and between W. E. DeLarm, party of the first part, and W. L. Tobey, a widower, and F. L. Tobey and Ritta M. Tobey, his wife, parties of the second part, WITNESSETH:

That for and in consideration of the sum of One Dollar (\$1.00) in hand paid by the party of the first part to the parties of the second part, receipt whereof is hereby acknowledged, and of the mutual covenants and agreements to be kept and performed by each of the parties hereto, it is agreed:

1. The first party agrees to buy and the second parties agree to sell to the first party one certain wheat ranch located in Gilliam County, State of Oregon, and consisting of about 4350 acres, situated in Section 31, Township 1 N. range 21 east part of sections 1 and 12 in township 1 S. range 22 east, all of sections 7 and 8 and one half of section 9, a part of section 3, all of section 4, a part of section 5 and all of section 6 in Township 1 S range 22 east, and known as "Tobey Brothers Ranch," together with all the accessories, tools, and 36 head of horses and mules, in good working condition, to be selected in the manner hereinafter set forth, and all equipment and appurtenances belonging to said ranch, including the growing crop thereon; all of which is more fully described in the schedule, lists and map or diagram hereto attached and made a part hereof.



2. The purchase price to be paid by the first party to the second parties is and shall be the sum of One hundred and forty one thousand and No-100 dollars (\$141,000.00) which price shall be and is payment in full for all of the property described in and covered by this agreement, and shall be paid by the first party to the second party in the following manner:

One Thousand (\$1000) Dollars of said sum shall be paid by said first party at the time of the delivery of the deeds and bill of sale transferring title to the first party herein as provided in this agreement, which amount shall be paid in money.

One hundred and Forty thousand (\$140,000) Dollars of said purchase price shall be paid by the first party at the same time as the payment of the \$1,000 last above mentioned by delivering to the second parties Series A, Columbia River Orchard Company's seven per cent, twenty year, bonds, of the par value of \$140,000.00. Second parties hereby acknowledge receipt of bonds in this paragraph described of the value of \$5,000, which shall be deducted from the amount herein provided to be delivered to them.

The cleavage date of this contract shall be the date hereof. All expenses prior hereto to be borne by the seller and all expenses after this date to be borne by the purchaser. Complete possession to pass to the first party upon delivery of deeds and bill of sale by second party and payment of purchase price by first party as herein provided. Second party will

care for and manage said property until possession is delivered as herein provided.

3. The second parties agree to furnish to the first party complete certified abstracts of the real property herein described, showing good and sufficient title in all of said land in the second parties free and clear of all incumbrances, (a clear and unincumbered title to be delivered to the first party hereunder), on or before March 15th, 1911; Provided, however, that if the abstractor in Gilliam County is unable to furnish the abstracts properly certified so that they may be delivered within the time herein fixed, but same are delivered as quickly as possible to obtain them from said abstractor, such failure shall not be construed a breach of contract by second parties.

On or before March 18th, 1911, or within three days after the delivery of abstracts showing clear title in second parties, the second parties will deliver to first party good and sufficient warranty deeds conveying said real estate, and good and sufficient bills of sale conveying said personal property to said first party, and on said date and at the same time the first party will deliver to second parties the *monies* and bonds covering the purchase price as hereinbefore provided.

The horses and mules shall be selected by second party, he leaving an average lot of 36 head of horses and mules for first party.

First party will secure for second parties a loan on the bonds herein provided to be delivered to them,

as follows: \$3,000 at the time of the delivery of title hereunder, and \$3,000 on or before April 15th, 1911. Said loan to be secured by the bonds described herein at the ratio of \$200 in bond for each \$100 so loaned; interest to be 7% and loan to run until on or before February 1st, 1912.

This agreement to bind the parties hereto, their successors, assigns, administrators, executors and personal representatives.

In witness whereof the parties hereto have set their hands this day and year first above written.

(Signed) W. E. DeLARM, Seal.

“ W. L. TOBEY, Seal.

“ F. L. TOBEY, Seal.

“ RETTA M. TOBEY, Seal.

In presence of

Geo. V. Hodges.

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EXHIBIT A.

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PARTIAL INVENTORY OF FARM IMPLEMENTS, TOLLS, ETC.

- 1 Caterpillar, Engine Hobt.
- 1 Engine Gang Plow.
- 4 Gasoline Storage Tanks, 4-1000 Gal.
- 1 Holt Harvester.
- 9 Wagons and Equalizer hitch.
- 8 Wheat racks.
- 7 Gang plows 3 bottom 14-in. Moline.
- 1 Walking plow.

- 4 Wood Harrows.
- 3 Steel Harrows.
- 4 Drills.
- 1 Hodge Header.
- 1 Hay Rake.
- 1 Iron Roller.
- 2 Feed racks.
- 1 Water Tank.
- 1 Cook House.
- 1 Buggy.
- 1 Fanning Mill.
- 2 Header Beds.
- 4 Discs & Hitch.
- 1 Hay rack.
- 1 Blacksmith Outfit and Small tools.

#### HOUSEHOLD GOODS

- 25 or 26 set of harness.
- 9 horses.
- 27 mules.
- 60 chickens.
- 4 Hogs & 4 Pigs.
- 1 Headquarters house 7 rooms.
- Bunk House and Pump room.
- 1 Wind Mill.
- 1 4 horse power fairbanks morse Gasoline engine  
& pump Jack.
- 1 Deep well pump 2 $\frac{1}{4}$ -in. or 2 $\frac{1}{2}$ -in. cylinder 190  
ft. Deep.
- 1 Reservoir 35 to 40 M concrete and roofed.
- 1 Sled for Harvester.



- 1 shed for wagons 60 feet long.
  - 1 blacksmith shop.
  - 2 straw and stock barns.
  - 1 large granery.
  - 1 small granary.
  - 1 shed for pigs.
  - 1 chicken house.
  - 1 trough in pasture portable.
- Also all grain now on place.

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EXHIBIT B.

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KNOW ALL MEN BY THESE PRESENTS,  
That we, Frank L. Tobey and Retta M. Tobey his wife, both of Portland, State of Oregon, in consideration of Ten and no-100 Dollars to us paid by Edward C. Kilbourne, of Seattle, State of Washington, have bargained and sold, and by these presents do grant, bargain, sell and convey unto said Edward C. Kilbourne, his heirs and assigns, all the following bounded and described real property, situated in the County of Gilliam and State of Oregon:

Northwest quarter of Northwest quarter of Section Four (4), North half of Section Seven (7), all in Township One South, Range Twentytwo (22) East of the Willamette Meridian, containing 371 acres more or less,

Together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and also all their estate,

right, title and interest in and to the same, including dower and claim of dower.

TO HAVE AND TO HOLD the above described and granted premises unto the said Edward C. Kilbourne, his heirs and assigns forever. And Frank L. Tobey grantor above named do covenant to and with Edward C. Kilbourne, the above named grantee, his heirs and assigns, that he is lawfully seized in fee simple of the above granted premises, that the above granted premises are free from all incumbrances, and that he will and his heirs, executors and administrators shall warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever.

In Witness Whereof, the grantors above named have hereunto set their hands and seals this 15th day of March, 1911.

FRANK L. TOBEY (Seal)

RETTA M. TOBEY (Seal)

Signed, sealed and delivered in the

presence of us as witnesses:

EDWARD J. BRAZELL.

W. E. DeLARM.

State of Oregon,

County of Multnomah,—ss.

Be it Remembered, That on this 15th day of March, A. D. 1911, before me, the undersigned, a Notary Public in and for said County and State. personally appeared the within named Frank L. To-

bey and Retta M. Tobey, his wife, who are known to me to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and Notarial Seal the day and year last above written.

EDWARD J. BRAZELL,

(Notarial Seal)

Notary Public for Oregon.

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EXHIBIT C.

KNOW ALL MEN BY THESE PRESENTS, That I, Augusta M. Tobey (widow), of Portland, of Multnomah County, State of Oregon, in consideration of Ten and no-100 Dollars to me paid by Edward C. Kilbourne, of Seattle, State of Washington, have bargained and sold, and by these presents do grant, bargain, sell and convey unto said Edward C. Kilbourne, his heirs and assigns, all the following bounded and described real property, situated in the County of Gilliam and State of Oregon: All of lots Three (3), Four (4), Five (5) and Six (6), of Section Three (3); and Lots One (1) and Two (2); and the South half of the Northeast quarter of Section Four (4); all in Township One (1) South Range Twenty-two (22) East of the Willamette Meridian, containing in all 343.36 acres, more or less, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in

anywise appertaining, and also all her estate, right, title and interest in and to the same, including dower and claim of dower.

To have and to hold the above described and granted premises unto the said Edward C. Kilbourne, his heirs and assigns forever. And Augusta M. Tobey, the grantor above named, do covenant to and with Edward C. Kilbourne the above named grantee his heirs and assigns that she is lawfully seized in fee simple of the above granted premises, that the above granted premises are free from all incumbrances and that she will and her heirs, executors and administrators shall warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever.

IN WITNESS WHEREOF, I the grantor above named, have hereunto set my hand and seal this 15th day of March, 1911.

AUGUSTA M. TOBEY (Seal)

Signed, sealed and delivered in the  
presence of us as witnesses:

EDWARD J. BRAZELL.

W. E. DeLARM.

State of Oregon,

County of Multnomah,—ss.

Be it Remembered, That on this 15th day of March, A. D. 1911, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named Augusta M. To-



bey, who is known to me to be the identical person described in and who executed the within instrument, and acknowledged to me that she executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and Notarial Seal the day and year last above written.

EDWARD J. BRAZELL,

(Seal)

Notary Public for Oregon.

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EXHIBIT D.

KNOW ALL MEN BY THESE PRESENTS, That I, William L. Tobey (unmarried), of Portland, State of Oregon, in consideration of Ten and no-100 Dollars, to me paid by Edward C. Kilbourne of Seattle, State of Washington, have bargained and sold, and by these presents do grant bargain, sell and convey unto said Edward C. Kilbourne his heirs and assigns, all the following bounded and described real property situated in the County of Gilliam and State of Oregon:

Northeast quarter (N E  $\frac{1}{4}$ ) of Section Twelve (12), Tn. 1 So. R. 21 East, Lots Three (3) and Four (4) and East Half (E $\frac{1}{2}$ ) of Southwest quarter of Section Seven (7), and Northeast quarter (NE $\frac{1}{4}$ ) of the Southwest quarter (SW $\frac{1}{4}$ ) of Section Four (4); and East half of the Northwest quarter (NW $\frac{1}{4}$ ) of Section Four (4), all in Township One South of Range Twenty-two (22) East of the Willamette Meridian, containing altogether 447.35 acres

more or less, together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and also all his estate, right, title and interest in and to the same, including dower and claim of dower.

TO HAVE AND TO HOLD the above described and granted premises unto the said Edward C. Kilbourne his heirs and assigns forever. And William L. Tobey grantor above named do covenant to and with Edward C. Kilbourne the above named grantee his heirs and assigns, that he is lawfully seized in fee simple of the above granted premises, that the above granted premises are free from all incumbrances, and that he will and his heirs, executors and administrators shall warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever.

In Witness Whereof, the grantor above named, has hereunto set his hand and seal this 15th day of March, 1911.

WILLIAM L. TOBEY (Seal).

Signed, sealed and delivered in the  
presence of us as witnesses:

EDWARD J. BRAZELL.

W. E. DeLARM.

State of Oregon,

County of Multnomah,—ss.

Be it Remembered, That on this 15th day of March,  
A. D. 1911, before me, the undersigned, a Notary

Public in and for said County and State personally appeared the within named William L. Tobey who is known to me to be the identical person described in and who executed the within instrument, and acknowledged to me that he executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my hand and Notarial Seal the day and year last above written.

EDWARD J. BRAZELL,

(Seal)

Notary Public for Oregon.

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EXHIBIT E.

KNOW ALL MEN BY THESE PRESENTS, That we, William L. Tobey, unmarried, and Frank L. Tobey and Retta M. Tobey, his wife, all of Portland, of State of Oregon, in consideration of Ten and no-100 Dollars to us paid by Edward C. Kilbourne, of Seattle, State of Washington, have bargained and sold, and by these presents do grant, bargain, sell and convey unto said Edward C. Kilbourne, his heirs and assigns, all the following bounded and described real property situated in the County of Gilliam and State of Oregon:

East half of the Northwest quarter ( $E \frac{1}{2}$  of  $NW\frac{1}{4}$ ) and the Northwest quarter of Northwest quarter ( $NW\frac{1}{4}$  of  $NW\frac{1}{4}$ ); and East half of Southwest quarter ( $E\frac{1}{2}$  of  $SW\frac{1}{4}$ ); and Southwest quarter of Southwest quarter ( $SW\frac{1}{4}$  of  $SW\frac{1}{4}$ ) of Section Thirty-one (31), Township One North Range

Twenty-two (22) East of Willamette Meridian. East half of East half ( $E\frac{1}{2}$  of  $E\frac{1}{2}$ ) of Section One (1), Township One South Range Twenty-one (21) East of Willamette Meridian. Southwest quarter of Northwest quarter ( $SW\frac{1}{4}$  of  $NW\frac{1}{4}$ ), Northwest quarter of Southwest quarter ( $NW\frac{1}{4}$  of  $SW\frac{1}{4}$ ); South half of Southwest quarter ( $S\frac{1}{2}$  of  $SW\frac{1}{4}$ ); and Southeast quarter ( $SE\frac{1}{4}$ ) of Section Four (4), Northeast quarter of Northeast quarter ( $NE\frac{1}{4}$  of  $NE\frac{1}{4}$ ), West half of the Northeast quarter ( $W\frac{1}{2}$  of  $NE\frac{1}{4}$ ), Northwest quarter ( $NW\frac{1}{4}$ ); and South half ( $S\frac{1}{2}$ ) of Section Five (5), East half ( $E\frac{1}{2}$ ) and Northwest quarter ( $NW\frac{1}{4}$ ), and West half of the Southwest quarter ( $W\frac{1}{2}$  of  $SW\frac{1}{4}$ ) of Section Six (6), Southeast quarter ( $SE\frac{1}{4}$ ) of Section Seven (7), all of Section Eight (8), West half ( $W\frac{1}{2}$ ) of Section Nine (9), all in Township One (1) South Range Twenty-two (22) East of the Willamette Meridian, containing altogether 3,107.58 acres more or less, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and also all their estate, right, title and interest in and to the same, including dower and claim of dower.

To Have and to Hold the above described and granted premises unto the said Edward C. Kilbourne, his heirs and assigns forever. And William L. Tobey and Frank L. Tobey, grantors above named do covenant to and with Edward C. Kilbourne, the above named grantee his heirs and assigns that they



are lawfully seized in fee simple of the above granted premises, that the above granted premises are free from all incumbrances and that they will and their heirs, executors and administrators, shall warrant and forever defend the above granted premises, and every part and parcel thereof, against the lawful claims and demands of all persons whomsoever.

In Witness Whereof, the grantors above named have hereunto set their hands and seals this 15th day of March, 1911.

WILLIAM L. TOBEY (Seal)

FRANK L. TOBEY (Seal)

RETTA M. TOBEY (Seal)

Signed, sealed and delivered in the  
presence of us as witnesses:

EDWARD J. BRAZELL.

W. E. DeLARM.

State of Oregon,  
County of Multnomah,—ss.

Be it Remembered, That on this 15th day of March, A. D. 1911, before me, the undersigned, a Notary Public in and for said County and State, personally appeared the within named William L. Tobey and Frank L. Tobey and Retta M. Tobey, his wife, who are known to me to be the identical persons described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily.

In Testimony Whereof, I have hereunto set my

hand and Notarial Seal the day and year last above written.

EDWARD J. BRAZELL,  
Notarial Seal.                      Notary Public for Oregon.

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### EXHIBIT F.

This indenture of Mortgage, made this 27th day of March, A. D. 1911, between Charles A. Kilbourne (a widower) of the City of Seattle, State of Washington, party of the first part (hereinafter called "said mortgagor") and W. J. Burns, of the City of Portland, State of Oregon, party of the second part (hereinafter called "said mortgagee").

WITNESSETH, That said mortgagor, for and in consideration of the sum of Twenty Thousand 00-100 (\$20,000.00) Dollars gold coin of the United States to him paid by said mortgagee (the receipt whereof is hereby acknowledged) by these presents does grant, bargain, sell and convey unto the said mortgagee, his heirs, executors, administrators and assigns all the following described real property situated in the County of Gilliam, State of Oregon, to-wit:

The East half of the Northwest quarter, the East half of the Southwest quarter, and Lots One (1) and Four (4) of Section Thirty-one (31), in Township One (1) North of Range Twenty-two (22) East of the Willamette Meridian; the East half of the Northeast quarter and the East half of the Southeast quarter of Section One (1), and the Northeast quar-

ter of Section Twelve (12), in Township One (1) South of Range Twenty-one (21) East of the Willamette Meridian, Lots Three (3), Four (4), Five (5) and Six (6) of Section Three (3). All of fractional Section Four (4), the Northeast quarter of the Northeast quarter, the West half of the Northeast quarter, the Northwest quarter, the Southwest quarter and the Southeast quarter of Section Five (5), all of fractional Section Six (6), all of fractional Section Seven (7), all of Section Eight (8), and the Northwest quarter and the Southwest quarter of Section Nine (9), all in Township One (1) South of Range Twenty-two (22) East of the Willamette Meridian, containing in all Four Thousand three hundred and forty-nine 29-100 (4,349.29) acres more or less.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the rents, issues and profits thereof. To have and to hold the above described real property, with the appurtenances unto the said mortgagee his heirs, executors, administrators and assigns forever. And the said mortgagor hereby covenants to and with the said mortgagee, that the said mortgagor is lawfully seized of the said real property and now has a valid and unincumbered fee simple title thereto, and that he will and his heirs, executors and administrators shall forever warrant and defend the same against all lawful claims and demands whatsoever.

The condition of this conveyance is such, that Whereas, said mortgagee has loaned to said mortgagor the full sum of Twenty Thousand 00-100 Dollars (\$20,000.00) in United States Gold Coin which is to be repaid in United States Gold Coin of the present standard of weight and fineness, together with interest thereon in like gold coin from date at the rate of eight per centum per annum and according to the tenor and effect of the following described promissory notes of even date herewith, being three principal notes and five interest notes, to-wit:

One principal note for \$5,000.00 due first November, 1913. One principal note for \$5,000.00 due 1st November, 1914. One principal note for \$10,000.00 due 1st November, 1915. One interest note for \$960.00 due first November, 1911. One interest note for \$1,600.00 due 1st November, 1912. One interest note for \$1,600.00 due 1st November, 1913. One interest note for \$1,200.00 due 1st November, 1914. One interest note for \$800.00 due 1st November, 1915. All of which said notes are executed and delivered by said mortgagor to said mortgagee and are payable to the order of the said mortgagee (on said loan of Twenty Thousand 00-100 Dollars) at the office of Balfour Guthrie Co., 350 California Street, San Francisco, California, with interest at the rate of eight per cent per annum after maturity and which said principal and interest notes with their terms and conditions are made parts of this mortgage. And the said mortgagor hereby covenants and agrees to



and with the said mortgagee as follows to-wit:

1. That he will pay each and all of said promissory notes, principal, interest, taxes and attorney's fees as specified therein, promptly when the same become due. 2. That he will keep up and maintain the buildings and improvements on said real property and will keep the same in a reasonable state of repair, and that he will not commit nor suffer waste upon said real property. 3. That he will pay all taxes, charges and assessments that may be lawfully imposed upon said real property by any public or quasi-public corporation, and will pay all incumbrances and liens of every kind on said real property, and the buildings and improvements now thereon or hereafter erected thereon, and that he will pay (ten days before the same become delinquent) all taxes which may be assessed in the State of Oregon upon this mortgage and the debt thereby secured or upon said promissory notes or any thereof, and that if he shall fail refuse or neglect to pay such taxes, assessments and liens, said mortgagee may pay the same. 4. That during the existence of this mortgage he will at his own expense keep the present buildings and improvements on said real property on any which may hereafter be erected thereon, insured against loss by fire to the extent of not less than four thousand 00-100 Dollars in some insurance company or companies as said mortgagee may select with loss, if any under such insurance payable to said mortgagee and will deliver the policies and renewals thereof to the said

mortgagee promptly after the issue thereof; and that if he shall fail, refuse or neglect to so insure said property or to keep the same so insured, the said mortgagee or otherwise, with loss thereunder payable to said mortgagee, and pay the premiums thereon.

5. That all sums of money so paid by said mortgagee as premiums on insurance and for taxes, assessments and liens as hereinbefore provided, shall at once become due and payable by said mortgagor, to said mortgagee and shall bear interest at the rate of eight per centum per annum from the day and days the same are paid by said mortgagee respectively; That said mortgagor covenants and agrees to repay the same to the said mortgagee together with the interest as aforesaid and that the same shall be added to the debt hereby secured and shall be a lien or liens on said mortgaged property, prior and superior to any and all other liens, created or attaching to said mortgaged property subsequent to the date of this mortgage. It is expressly understood and agreed however, that no payments so made by said mortgagee shall be a waiver of the rights of said mortgagee arising hereunder from the breach of any of the covenants or agreements herein on the part of said mortgagor.

Now therefore, if the said mortgagor shall pay said promissory notes and each of them in accordance with the terms thereof and the taxes as therein provided, and shall fully satisfy and comply with all covenants and agreements herein contained, then

this conveyance shall be void and of no effect; but otherwise to remain in full force and virtue as a mortgage to secure the payment of said promissory notes in accordance with the terms thereof, and all addition to said debt and the performance of the conditions, covenants and agreements herein provided, and as such shall be subject to foreclosure it being agreed that any failure to make any of the payments provided for in said notes or either or any of them or in this mortgage for a period of ten days after the same shall become due and payable or to perform any of the covenants or agreements herein contained shall forthwith or at any time thereafter give to said mortgagee the option to declare the whole amount due on said notes or unpaid thereon and under this mortgage at once due and payable and to foreclose this mortgage. It is further expressly covenanted and agreed that in the event of this mortgage being foreclosed, the said mortgagor shall pay such sum as the Court may adjudge reasonable as attorney's fees in this suit or action, and subject to this mortgage, the same shall become a lien upon said above described real property; which said fee shall be due when suit is begun, and shall be recovered whether final decree be entered or not, and not as a part of the costs of the commencement of this suit. Each and all of the covenants and agreements herein contained shall apply to and bind the heirs, executors, administrators and assigns of said mortgagor and of said mortgagee respectively.

In Witness Whereof, the said mortgagor has hereunto set his hand and seal this the day and year in this Indenture of Mortgage written.

CHARLES A. KILBOURNE (Seal).

Executed in the presence

us as witnesses:

JAMES CORMACK.

CHAS. BURNES.

State of Oregon,

County of Multnomah,—ss.

Be It Remembered, That on this 28th day of March, 1911, before me, the undersigned, a Notary Public in and for the State and County aforesaid, personally appeared the within named Charles A. Kilbourne (a widower) to me known to be the individual described in and who executed the within instrument of writing and acknowledged to me that he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this the day and year in this my certificate written.

JAMES CORMACK,

(Seal)

Notary Public in and for the  
State of Oregon.

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Know All Men By These Presents; That for and in consideration of One Dollar (\$1.00) to him in hand paid, the receipt whereof is hereby acknowledged W. J. Burns, of the City of Portland, State



of Oregon, has assigned, transferred and conveyed, and does hereby assign, transfer and convey unto the Edinburgh Pacific Coast Mortgage Agency, Limited (a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland, with its registered office at Edinburgh, Scotland) the following described mortgage, together with the notes thereby secured, to-wit: Mortgage for Twenty Thousand Dollars (\$20,000.00) from Charles A. Kilbourne (a widower) to W. J. Burns dated 27th March, 1911, and recorded on page 475, Book L of Records of Mortgages of Gilliam County, State of Oregon, of which mortgage there now remains unpaid Twenty Thousand Dollars (\$20,000.00) principal, with interest thereon from 1st November, 1911.

To have and to hold unto the said Edinburgh Pacific Coast Mortgage Agency, Limited, its successors and assigns, the said mortgage and notes, with all the rights and privileges thereunto belonging or in anywise appertaining, including the right to recover all outlay for taxes and fire insurance premiums under the provisions of said mortgage.

In Witness Whereof, the said W. J. Burns has signed and sealed these presents this twenty first day of November, A. D. 1911.

W. J. BURNS (Seal).

In presence of

JAMES CORMACK.

ALEX. D. MACKENZIE.

State of Oregon,  
County of Multnomah,—ss.

Be It Remembered, That on this 21st day of November, A. D. 1911, before me the undersigned a Notary Public in and for said County and State personally appeared the within named W. J. Burns who is known to me to be the identical person described in and who executed the within instrument and acknowledged to me that he executed the same freely and voluntarily for the purposes therein set out.

In Witness Whereof I have hereunto set my hand and seal the day and year last above written.

JAMES CORMACK,  
(Seal) Notary Public in and for  
State of Oregon.

State of Oregon,  
County of Josephine,—ss.

I, William L. Tobey, being first duly sworn, depose and say that I am one of the Complainants in the above entitled suit; and that the foregoing Bill of Complaint is true as I verily believe.

WILLIAM L. TOBEY.

Subscribed and sworn to before me this 10 day of June, 1912.

CHARLES LADD,  
(Notarial Seal) Notary Public for  
the State of Oregon.

Filed June 14, 1912: A. M. CANNON, Clerk.

And afterwards, to-wit, on the 7th day of October, 1912, there was duly filed in said Court and cause, praecipe for appearance of Edward C. Kilbourne et. al., in words and figures as follows, to wit:

**[Entry of Appearance of Solicitors for Edward  
C. Kilbourne, et. al.]**

*In the District Court of the United States for the  
District of Oregon.*

No. 5611.

FRANK L. TOBEY et al.

*vs.*

W. E. DE LARM, EDWARD C. KILBOURNE,  
CHARLES E. KILBOURNE et al.

To the Clerk of the Above Entitled Court:

You will please enter our appearance as Solicitors in the above entitled cause for the Defendants Edward C. Kilbourne and Charles A. Kilbourne.

C. E. S. WOOD.

RICHARD W. MONTAGUE.

ISAAC D. HUNT.

ERSKINE WOOD.

Filed and entered October 7, 1912:

A. M. CANNON, Clerk.

And afterwards, to wit on the 14th day of July, 1913, there was duly filed in said Court and cause, an amended answer, of said Edward C. Kilbourne and Charles A. Kilbourne in words and figures as follows, to wit:

**[Amended Answer of Said Edward C. Kilbourne  
and Charles A. Kilbourne]**

*In the District Court of the United States for the  
District of Oregon.*

IN EQUITY.

FRANK L. TOBEY et al.

Complainants.

*vs.*

W. E. DE LARM, EDWARD C. KILBOURNE,  
CHARLES E. KILBOURNE et al.

Defendants.

**AMENDED ANSWER.**

The joint and several amended answer of Edward C. Kilbourne and Charles A. Kilbourne, defendants, to the bill of complaint of the above named complainants.

These defendants respectively reserving all manner of exceptions that may be had to the many errors, uncertainties and imperfections of the bill, come and make their amended answer thereto, or to so much thereof as they are advised is material to be answered, and say:

I.

Defendants deny any knowledge or information



sufficient to form a belief as to each and every allegation of Articles IX and X of the said bill, and therefore call for proof of the same.

## II.

Defendants deny any knowledge or information as to the agreement mentioned in Articles XI, XII, XIII, XIV, XV, and XVI, of said bill, except such knowledge as they have gained from a purported copy of said agreement and from an inspection of the original of said agreement, which is now on file in this Court, and reserve the right to introduce proof concerning the same, and now call for proof of all the facts alleged other than the existence of such document.

## III.

Defendants deny that the parties of the second part in said agreement executed a bill of sale in favor of W. E. DeLarm, as alleged in Article XXI. of said bill, but allege the truth to be that said bill of sale was executed in favor of defendant Edward C. Kilbourne.

## IV.

Answering to Article XXII of said bill, defendants deny that the real property therein mentioned was at the time of said agreement of the reasonable value of \$141,000.00, or that said real property is worth that much and more now, but allege the truth to be that said real property at said time was of the reasonable value of to wit, \$52,000.00, and no more. and at the present time it is worth, by reason of the

additional improvements which these defendants have put upon said land and the better cultivation said defendants have given said land, the sum of to wit, \$60,000.00, and no more.

#### V.

Answering to Article XXIII of said bill, defendants deny that the personal property therein mentioned was at the time it was turned over, as therein alleged, of the value of \$13,500.00 to \$14,000.00, or that it would be worth that much and more at the present time if the same could be redelivered to the complainants herein, but allege the truth to be that said personal property was at the time it was turned over as alleged, of the reasonable value of \$9,500.00, and no more, and that since that time it has depreciated in value twenty per cent.

#### VI.

Answering Article XXIV of said bill, defendants deny any knowledge or information sufficient to form a belief as to the allegations, or any of them, therein, and therefore call for proof of the same.

#### VII.

Answering Article XXV of said bill, defendants deny any knowledge or information sufficient to form a belief as to any of the matters therein alleged, except that defendants admit that Edward C. Kilbourne was with the said DeLarm examining the said property, and defendants allege the truth to be that when said Edward C. Kilbourne was with the said DeLarm examining said property, he was acting in

the capacity of an irrigation and engineering expert employed by the said DeLarm, to give his opinion on said property, and particularly as to its adaptability to irrigation, and that neither at that time nor ever, did he know the consideration that passed from said DeLarm to complainants for said property, except that long after said examination was made and some time after the properties herein mentioned were deeded to him in settlement as hereinafter alleged he received what purported to be a copy of the agreement referred to in Article II hereof, and heard that part of the purchase price paid by DeLarm for said property was \$140,000.00 in Columbia River Orchard Company's bonds; and defendants allege the truth to be that at the time said examination was made said Edward C. Kilbourne neither did nor said anything to lead complainants or any of them to believe that he was associated in business with the said DeLarm or with the Columbia River Orchard Company or other corporations or associates of the said DeLarm, that neither of defendants was at any time so interested and did not know anything about the dealings between said DeLarm and the complainants, and allege that said Edward C. Kilbourne never was associated with said DeLarm or with the Columbia River Orchard Company or other corporations or associates of the said DeLarm in business or otherwise, and except as herein admitted allege that neither of defendants had any notice or knowledge of any alleged frauds at any time other than the allegations of this

bill, and defendants call for proof of the allegations of Article XXV.

### VIII.

Answering Article XXVII of said bill, defendants deny any knowledge or information sufficient to form a belief as to any and all of the matters therein alleged, except the allegation that the alleged false representations made by the said DeLarm were known to be false by these defendants, which these defendants specifically deny, and allege the truth to be that at none of the times referred to in said bill or at any time did they or either of them know anything as to what representations were made by the said DeLarm as to the said bonds, or know anything whatever of any alleged fraud or have any notice thereof, and that they believed at the time the agreement hereinbefore mentioned was made and at the time the deeds to said property were executed and delivered to said Edward C. Kilbourne, and for some time thereafter, that the bonds of the Columbia River Orchard Company had a substantial value and that if the Wahluke Irrigation Project was carried to completion, as seemed likely, that the said bonds would be worth their face value, and except as herein expressly admitted, defendants call for proof of the allegations of Article XXVII of the bill.

### IX.

Defendants deny each and every allegation of Article XXVIII of the bill.



**X.**

Answering Article XXIX, defendants deny any knowledge or information sufficient to form a belief as to the truth or falsity of the statement on the face of the bonds, or as to the purpose of said statement, and call for proof of same, and defendants specifically deny that said bonds have never had any value, or were at all times and are now worthless, but allege the truth to be that said bonds had a substantial value, as before alleged, and even now have some value, based on the fact that they are the first mortgage bonds of the Wahluke Irrigation Project, which is now practically completed and is a meritorious project, and that efforts are now being made by the bondholders to reorganize the said project and to pay off the liens for labor and materials now upon the irrigation works of said project and that if this effort is successful these bonds will still be of considerable value.

**XI.**

Defendants deny that they knew, as alleged in said Article XXIX, that said bonds at no time had any value or were or are now valueless, and as before deny that they or either of them at any time ever knew or had notice of any of the alleged frauds stated in the bill.

**XII.**

Answering Article XXX, the said defendants deny that they or either of them conspired or confederated together with the persons therein named, or any

or either of them, or with any other person or persons, for the purpose of defrauding any complainants, or any person or persons whomsoever; and deny that the said W. E. DeLarm dominated and controlled them, or either of them, or that they were instruments in his hands, or acted with him for the purpose of perpetrating these alleged frauds, or any frauds, whatsoever.

### XIII.

Defendants deny each and every allegation in Article XXXI of said bill except the allegation as to the purposes for which the said DeLarm formed the said corporations, as to which they deny any knowledge or information sufficient to form a belief and call for proof of the same.

### XIV.

And defendants allege the truth to be that heretofore, to wit, in the year 1901, the defendant Charles A. Kilbourne and Walter G. Clark caused to be incorporated the Kilbourne & Clark Company, the principal business of which was that of wholesale dealers in electrical supplies and machinery and as engineering expert and contractor for the construction of electric lighting, power and irrigation plants and the sale of allied machinery.

### XV.

That the defendant Edward C. Kilbourne became a principal stockholder and associated with the management of said Kilbourne & Clark Company in the year 1905, and that in the course of its regular bus-

iness the said company has furnished the machinery for or constructed a great many irrigation pumping plants, including a number of such pumping plants on the Columbia River.

## XVI.

That in the regular course of the business of said company the defendant W. E. DeLarm came to the officers of the said company, to wit, to the defendants Charles A. Kilbourne and Edward C. Kilbourne, toward the end of the year 1909, and represented to them that he was president of the Columbia River Orchard Company, a corporation, and that said corporation had an irrigation project near Wahluke, Washington, on the Columbia River, which the said company intended to develop by pumping water from the Columbia River, and requested them to submit plans and estimates for a pumping station in connection with such project. The said Kilbourne & Clark Company prepared and submitted said plans and estimates, and subsequently, to wit, on January 18, 1910, entered into a contract with the said Columbia River Orchard Company to construct for said last named company a pumping plant for the said Wahluke project; before doing so, however, it requested of the said DeLarm a financial statement and some evidence of the credit of himself and of his said corporation, to-wit, Columbia River Orchard Company. The said DeLarm was, at that time, a perfect stranger to the said Charles A. Kilbourne and Edward C. Kilbourne and they were unwilling

to contract with him without this evidence from him as to responsibility. Accordingly he submitted a statement showing assets of the Columbia River Orchard Company, aggregating, to-wit \$900,000.00, against which was a total liability of, to-wit \$300,000.00, being a bond issue which was represented by the said DeLarm as being as good as sold in the East. On this showing, and having faith in the said DeLarm, the said Kilbourne & Clark Company contracted with his said corporation, to wit Columbia River Orchard Company, to build the said pumping plant, and work was commenced under said contract, which work later had to be rushed day and night on account of the rapid rise of the Columbia River. The said Kilbourne & Clark Company sublet a part of the said contract to the Puget Sound Bridge & Dredging Company, which is one of the largest and most responsible contracting companies in the Pacific Northwest.

## XVII.

The sale of the said issue of \$300,000.00 of bonds was not made in the East as expected by the said DeLarm, and after the account of said Kilbourne & Clark Company with the said Columbia River Orchard Company for work done under said contract had reached a total of more than \$43,000.00 the said Kilbourne & Clark Company stopped work thereunder, pending a settlement. Work was thus stopped on, to wit July 13th, 1910.



## XVIII.

While matters were thus suspended the said DeLarm came to said Kilbourne & Clark Company, to wit February . . , 1911, and requested the defendant Edward C. Kilbourne to go with him to Gilliam County, Oregon, to examine a ranch which the said DeLarm said that he had purchased there and upon which he wished an expert opinion as to the quality of the land and particularly as to its adaptability to irrigation. Upon the said DeLarm agreeing to pay all expenses, which he did, the defendant Edward C. Kilbourne accompanied the said DeLarm to Portland, Oregon, where the two were met by . . . . . Tobey, one of the complainants herein, and the last named three persons thereupon went to Olex, in Gilliam County, Oregon, where the said Tobey showed to the said DeLarm and the said Edward C. Kilbourne the said ranch, and the said DeLarm and Edward C. Kilbourne examined the same. The said Edward C. Kilbourne, in making such examination, was employed, as hereinbefore alleged, only as consulting engineer, and had no interest whatever in the property except as an expert hired to give his opinion thereon, and did not know then and never did know anything of the deal between the said DeLarm and the complainants, or of DeLarm's affairs or representations as set up in the bill of complaint herein, or otherwise, except as hereinbefore alleged in Article VII hereof. During said examination of said ranch no details of the transaction between De-

Larm and the complainants were discussed in the presence of the defendant Edward C. Kilbourne, nor at any time thereafter; the said defendant Edward C. Kilbourne acting as consulting engineer gave his opinion to the said DeLarm, which was in general favorable to the said property reported on, provided water could be secured with which to irrigate the same, and the defendant Edward C. Kilbourne then returned to Seattle, his place of business.

### XIX.

Afterward, to wit March . . . , 1911, the said DeLarm informed these defendants that he could not at that time pay the said claim of the Kilbourne & Clark Company for, to wit \$43,000.00 in cash, and he proposed that he turn over to these defendants the said ranch which the said Edward C. Kilbourne had examined as aforesaid, together with certain ranch equipment, in settlement of said claim and in consideration of the said Kilbourne & Clark Company agreeing to complete said irrigation project and if requested so to do within one year to construct an additional unit to said pumping plant at an approximate cost of, to wit ten thousand dollars (\$10,000.00). The said Kilbourne & Clark Company was at that time ceasing from active business operations, and therefore the said defendants Charles A. Kilbourne and Edward C. Kilbourne agreed, as individuals, to accept the said ranch and its accompanying equipment, and in payment therefor to assume the debt of, to-wit \$43,000.00, which DeLarm's corporation owed

the Kilbourne & Clark Company as aforesaid, and to complete the said pumping plant for the Wahluke Irrigation Project and to install an additional unit, as aforesaid, if requested so to do within one year; but it was an express condition of said agreement and in part consideration therefor, that the said DeLarm would furnish seventy-five hundred dollars (\$7,500) in cash to be used in securing the release of a lien for to wit twenty-five thousand dollars (\$25,000) which the said Puget Sound Bridge & Dredging Company had filed upon the said Wahluke Irrigation Pumping Plant for work done by it as sub-contractor thereon, and that the said DeLarm should pay off the claim of the Moran Company amounting to, to wit twenty-two hundred and fifty dollars (\$2,250), which claim was also for work done on said plant as sub-contractor; the said Kilbourne & Clark Company as original contractor for this work being liable to the said sub-contractor for these debts.

## XX.

These defendants made said agreement with the said DeLarm and accepted the said ranch in settlement, as aforesaid, without any knowledge or notice of any of the alleged frauds in the bill stated or any fraud and only after much hesitation and reluctance, for the reason that it tied up their capital and compelled them practically to go out of the engineering-contracting business and engage in the business of ranching.

## XXI.

After the making of said agreement of settlement, as aforesaid, these defendants continued the work on said irrigation plant and expended thereon the further sum of, to wit seventeen thousand dollars (\$17,000), and on or before, to wit June 11, 1911 performed every part of said agreement of settlement, except such as they were released from performing as hereinafter alleged, and all without any knowledge, notice or suspicion of any of the frauds alleged in the bill.

## XXII.

Defendants believed that the claim of the said Kilbourne & Clark Company and of the Puget Sound Bridge & Dredging Company were the principal demands upon the said Columbia River Orchard Company or DeLarm for ready cash, and with these eliminated in the manner proposed by the said agreement of settlement, the said defendants saw no obstacle in the way of the Columbia River Orchard Company's Wahluke enterprise being a success, and so continued in said belief till the said Company went finally into the hands of a receiver, to wit February, 1912.

## XXIII.

Defendants further allege that in order to satisfy the said claim of Puget Sound Bridge and Dredging Company of, to wit twenty-five thousand dollars (\$25,000), they pledged to said company their individual holdings of real estate, but that the said De-



Larm never furnished the said sum of, to wit seventy-five hundred dollars (\$7,500) in cash, nor paid off the said Moran claim of, to wit twenty-two hundred and fifty dollars (\$2,250) as agreed, and that the said claims of \$7,500 and \$2,250, together with interest and attorney's fees now amount to over eleven thousand dollars (\$11,000), which latter sum is still due from said DeLarm's said corporation, the Columbia River Orchard Company, to these defendants.

#### XXIV.

Defendants further allege that in order to carry on the construction of the said Wahluke Irrigation Plant and some other construction work in which the said Kilbourne & Clarke Company was then engaged, the defendant Charles A. Kilbourne had advanced to the said company the sum of, to wit more than seventy-two thousand dollars (\$72,000), and after said ranch and accompanying equipment had been, at the request of the said DeLarm, transferred by the complainants to the defendant Edward C. Kilbourne, on to wit March 15th, 1911, the said Edward C. Kilbourne on, to wit March 25, 1911, transferred the same to the defendant Charles A. Kilbourne in part settlement of the said advances of, to wit seventy-two thousand dollars (\$72,000), all without any knowledge or notice of any fraud alleged in the bill or of any fraud.

#### XXV.

Defendants deny that no consideration passed between the said Edward C. Kilbourne and complain-

ants for the said ranch and equipment as alleged in Article XXXI of said bill of complaint, and allege the truth to be that the said W. E. DeLarm, at the time the complainants transferred the legal title to said lands and equipment to the said Edward C. Kilbourne, was the holder of the equitable title thereto by reason of the contract of sale, copy of which is attached to said bill of complaint and marked Exhibit "A," and that the said agreement between the said DeLarm and the said defendants was good and sufficient consideration for said transfer, which agreement was fully performed as herein stated by the defendants in good faith, without fraud or knowledge or notice of any fraud against complainants or any one.

#### XXVI.

Defendants allege that the mortgage for seventeen thousand five hundred dollars (\$17,500) referred to in Article XXXII of the bill of complaint, was given by the defendant Charles A. Kilbourne in consideration of an agreement on the part of the mortgagee to pay to the said Charles A. Kilbourne the sum of seventy-five hundred dollars (\$7500), and to pay to the said W. E. DeLarm as president of the Columbia River Orchard Company the sum of ten thousand dollars (\$10,000), and that this sum of ten thousand dollars (\$10,000) so to be paid to the said DeLarm was the consideration for said Columbia River Orchard Company releasing these defendants from their obligation to install the additional unit

as aforesaid and from their obligation to complete the intake of the said irrigation plant, the completion of which intake was rendered impracticable by high water and was of minor importance, and that neither the said mortgagee nor his assigns have ever paid to the said Charles A. Kilbourne the said sum of seventy-five hundred dollars (\$7500) and these defendants were ignorant and are now ignorant, except as it appeared from the testimony in the bankruptcy proceedings of the Washington Orchard Irrigation and Fruit Company, as to what discount the said W. E. DeLarm agreed to allow or allowed on the said sum of ten thousand dollars (\$10,000) agreed to be paid to him by the said mortgagee, and that the said sum of seventy-five hundred dollars (\$7500) was intended by the said Charles A. Kilbourne to be used in part payment of the claim of the Puget Sound Bridge & Dredging Company before mentioned.

## XXVII.

Answering Article XXXIII of said bill of complaint, defendants deny any knowledge or information sufficient to form a belief as to the allegations therein contained, except the allegations that J. Alexander Wakefield was a confederate with these defendants in a conspiracy to defraud and that said Wakefield and Cyrus F. Clapp and H. E. Lutz knew that the business conducted by these defendants was a fraud, which allegations these defendants specifically deny and call for proof of the same and allege

the truth to be that neither they nor either of them was a party to any conspiracy or any fraud whatsoever, or had at any time any knowledge or notice of such fraud or any fraud.

### XXVIII.

Answering Article XXXIV of said bill of complaint, defendants deny that they or either of them were perpetrating or endeavoring to perpetrate any fraud whatever either in taking the title to said land and the accompanying equipment as aforesaid, or in mortgaging the same, or in doing anything else whatsoever.

### XXIX.

Answering Article XXXV of said bill of complaint defendants deny any knowledge or information as to the good faith in which the complainants entered into the transactions alleged in said bill of complaint, or that complainants transferred everything they owned in the world to the said W. E. DeLarm, or as to what representations the said W. E. DeLarm or his associates made to them on any matter whatsoever, or that the property they owned at that time was the result of their life work, or as to what they believed as to the alleged representations, or thought as to the value of the consideration they were getting for their lands; and call for proof of the same; and defendants allege the truth to be that neither they nor either of them ever made any representations whatsoever to the said complainants, and were never the associates of the said W. E. DeLarm



or interested in his corporations, except in the manner hereinbefore alleged; and the said defendants are informed and believe and therefore allege that the complainants did not transfer everything they owned in the world to the said W. E. DeLarm, but that at that time they, or some of them, owned valuable Portland property which they still own.

### XXX.

Answering Article XXXVI of the said bill of complaint, defendants deny any knowledge or information as to the allegations therein contained, except that the defendants are informed and believe and therefore allege that the Columbia River Orchard Company is not insolvent, although it is in the hands of a receiver and call for proof of each and every allegation of said Article.

### XXXI.

Answering Article XXXVII of said bill of complaint defendants deny any information or knowledge sufficient to form a belief as to the matters therein alleged, except the allegation that these defendants were associated in any way with the said W. E. DeLarm or his corporations, and that these defendants knew about the said fraudulent transactions of the said W. E. DeLarm or were familiar with them or acted in conjunction with him or his confederates or associates, or had full knowledge or any knowledge whatever of the method or manner in which the said business was done; all of which allegations these defendants specifically deny, and allege

the truth to be that they were not nor was either of them at any time associated or connected with the said W. E. DeLarm or any of his companies or corporations or associates, except as hereinbefore alleged, to wit, as contracting engineers and constructors of the said irrigation plant, and defendants call for proof of the allegations of said Article XXXVII.

### XXXII.

These defendants deny any knowledge or information as to each and every allegation contained in Article XXXVIII of the said bill of complaint and call for proof of the same.

### XXXIII.

Answering Article XXXIX of the said bill of complaint these defendants deny that it is necessary, for the protection of complainants' interest, that an injunction issue to prevent these defendants, or whoever is in possession of the crops growing on said land, from disposing of the same.

### XXXIV.

These defendants allege the truth to be that the said land lies in the semi-arid belt of the State of Oregon, in a district which has had either total crop failures or very light crops during the past four or five years, except the year 1912; and that at the time the complainants transferred said lands and the accompanying equipment for said irrigation bonds and other consideration as alleged in the bill of complaint, the land owners in the district in which said

lands lie were very discouraged on account of the repeated crop failure, and many of them were selling out and leaving the country, and land in this vicinity was very cheap, and that at the same time irrigation bonds were looked upon as a good investment; and defendants are informed and believe and therefore allege the truth to be that before the said complainants had exchanged their said property for said bonds as aforesaid, they carefully investigated the value of said bonds and employed a skilled attorney to aid them in such investigation, and —— Tobey made a special trip to Seattle in pursuance of such investigation, and after complainants had bought the said bonds from the said DeLarm by transferring said property, they or some of them bought more bonds of the same series from other parties in order to obtain control of the entire issue of said bonds, and the complainants Frank L. Tobey and William L. Tobey are not guileless farmers, but are merchants who have for many years been engaged in the general merchandise business in Gilliam County, Oregon, and are hard-headed, shrewd business men, quite able to look out for their affairs, and for the affairs of the other complainants.

#### XXXV.

And defendants and each of them allege the truth to be that relying upon the acquiescence of the complainants in consenting to the transfer of the legal title to the lands described in the bill direct from themselves to defendants, and relying on the

close relation which seemed to exist between the complainants and said DeLarm, and relying on the statements of the complainants to the defendants that DeLarm had told them he was conveying their (complainants') lands to the defendants in payment for the services of the Kilbourne & Clark Company, and for the completion of the pumping plant at Wahluke, and that they, the complainants, were well advised in the premises, the defendants received said deeds direct from the complainants and assumed and paid the bill due from DeLarm to the Kilbourne & Clark Company, to wit \$43,000.00, and completed the pumping plant at Wahluke at a cost of to wit, \$17,000.00, and paid the said DeLarm the sum of to wit, \$10,000.00 to be released from their obligation to complete the second unit of said pumping plant, as more fully heretofore described in this amended answer; and to execute said work and make such payment and to pay the Puget Sound Bridge and Dredge Company and Moran Bros., the total sum, to wit, \$9750.00, as more fully hereinbefore set forth, mortgaged said lands for the sum of to wit \$37,500.00, as more fully hereinbefore set forth; and relying on the representations of the complainants that they knew of the dealings between DeLarm and these defendants in the matter of the conveyance of said lands, as in this amended answer set forth, these defendants have invested in necessary machinery, equipment, etc., for the farming of said lands, the sum of to wit \$13,000.00, which will be a loss to these



defendants if deprived of the said lands; and in order to make cultivation profitable and not a loss have added to said lands by the purchase of other lands necessary for the cultivation of either or any of said lands at a profit and have paid for said added lands the sum of to wit \$23,000.00, and unless the entire tract can be operated as a whole the said investment will be a loss to these defendants.

Wherefore, and by reason of the foregoing, the complainants and each of them ought to be estopped to maintain this bill in a court of equity; and these defendants pray that the bill of complaint filed herein be dismissed and for a decree that neither complainants nor any of them have any right, title or interest in the said real estate or personal property transferred by the complainants to Edward C. Kilbourne as alleged in said bill of complaint, and by him transferred to said Charles A. Kilbourne, and that the title of the said Charles A. Kilbourne to said property is valid and complete, and that these defendants may recover their costs and disbursements in this suit, and for such other, further and different relief as may seem equitable in the premises.

EDWARD C. KILBOURNE,

CHARLES A. KILBOURNE.

WOOD, MONTAGUE & HUNT,

C. E. S. Wood, Richard W. Montague, Isaac D. Hunt, Erskine Wood,

Solicitors for Defendants, Edward C. Kilbourne and Charles A. Kilbourne.

United States of America,  
District of Washington—ss:

I, Edward C. Kilbourne, and I, Charles A. Kilbourne, being first duly sworn, each for myself and not one for the other, say on my oath that I have read the foregoing amended answer and know its contents, and that what is therein contained as far as it concerns my own act and deed is true of my own knowledge, and that what relates to the act and deed of any other person or persons I believe to be true.

CHARLES A. KILBOURNE,  
EDWARD C. KILBOURNE.

Sworn to before me this 11th day of June, 1913.  
(Notarial Seal) J. W. JACKSON.

Notary Public in and for the State of Washington,  
residing at Seattle. My commission expires October  
23, 1914.

State of Oregon,  
County of Multnomah,—ss

I, Erskine Wood, one of the attorneys for the defendants Kilbourne in the above entitled cause, do hereby certify that I have compared the foregoing copy of amended answer with the original thereof, and that the same is a full, true and correct copy of such original, and of the whole thereof.

ERSKINE WOOD,

Of Solicitors, Defendant Kilbourne

Filed July 14, 1913.

A. M. CANNON, Clerk.

And afterwards, to wit, on the 11th day of August, 1913, there was duly filed in said Court and cause opinion in words and figures as follows, to wit:

[Opinion]

*In the District Court of the United States for the  
District of Oregon.*

FRANK L. TOBEY et al.

Complainants.

vs.

W. E. DE LARM, EDWARD C. KILBOURNE.

CHARLES E. KILBOURNE et al.

Defendants.

MEMORANDUM ON MERITS.

BEAN, District Judge:

This is a suit to set aside conveyances of real and personal property made by the plaintiffs to the defendants Kilbourne at the request of the defendant DeLarm, the original purchaser thereof, on the ground that the purchase by DeLarm was induced by fraud and deceit.

It is unnecessary to allude to the testimony in detail. It is sufficient that in March, 1911, DeLarm contracted to purchase the property in question from plaintiffs and pay therefor in bonds of the Columbia River Orchards Company, of which company he was the president and general manager. Before the deeds had been executed and delivered to DeLarm he sold the property to the defendants Kilbourne in consideration that, as individuals they would assume

and pay an indebtedness of about \$43,000 due the Kilbourne & Clark Company on an unfinished contract for the construction of a pumping plant for the Orchards Company and would complete such contract and install an additional unit. The deed was thereupon, at DeLarm's request and by plaintiff's consent, made direct to the defendant E. C. Kilbourne, who a few days later, conveyed it to the defendant Charles A. Kilbourne in payment of an indebtedness of \$75,000 owed him for money theretofore advanced to the Kilbourne & Clark Company. It clearly appears that the plaintiffs, in making the sale to DeLarm, relief upon the representations of DeLarm and one Hodges as to the securities behind the bonds of the Orchards Company, given in exchange for the property, and that such representations were false and fraudulent, and that the bonds were in fact of no substantial value. But the evidence shows that the defendants Kilbourne were not parties to such fraud and knew nothing about it until long after they had paid the full consideration agreed by them to be paid for the property. They were not officers or agents of the Orchards Company and did not know the amount of bonds issued or contemplated to be issued by it, or the securities behind such bonds, or the truth or falsity of any representations made by DeLarm or Hodges concerning the same, or the details of the transactions between the plaintiffs and DeLarm. They merely represented a creditor of the Orchards Company, and were endeavoring in



good faith to obtain payment of an indebtedness due from such company to the Kilbourne & Clark Company, of which company there were the officers and managers. In compliance with their agreement with DeLarm, they assumed and paid a debt of about \$43,000 due the Kilbourne & Clark Company from the Orchards Company, completed the pumping plant at an expense of sixteen or seventeen thousand dollars, paid DeLarm ten thousand dollars, which was a reasonable sum, to be released from the stipulation to construct the additional unit, before they had any notice or knowledge of the alleged fraud. In fact, during all this time the bonds of the Orchards Company were generally regarded as valid securities and were being repeatedly exchanged at par for property in Seattle and elsewhere. The defendants thus paid for the property an amount not so disproportionate to its value as to amount to a fraud, in good faith and without notice or knowledge that the property had been obtained by DeLarm from the plaintiffs through fraud and deceit. The fact that of the money used for such purpose, \$37,500 was borrowed by defendants and secured by mortgage on the property in controversy does not alter the situation. They are primarily obligated for the payment of such money, and if parties to the fraud, or if they had knowledge thereof at the time they took the conveyance, they would probably be required to take care of the indebtedness from their private funds, thus relieving the mortgaged property from

the lien. For the purpose of this case, therefore, they stand in the same position in regard to such money as if they borrowed it on their individual credit, or obtained it from other sources. They are therefore in fact innocent purchasers for value and without notice.

It is claimed, however, that they are not entitled to the protection of such purchasers because the conveyance of the property was made by the plaintiffs direct to them. One who purchases merely an equity cannot be a bona fide purchaser, for the protection extended by a court of equity to such purchaser belongs only to the purchaser of the legal estate. (*Butler vs. Douglas*, 3 Fed. 613. *U. S. vs. Detroit T. & L. Co.*, 131 Fed. 668). But the Kilbournes did not purchase DeLarm's interest in the contract with the plaintiffs, or succeed to his rights thereunder, nor is their defense based on such contract. They purchased the legal estate and it has been conveyed to them, and the fact that the deeds were made to them direct by the plaintiffs, and not to DeLarm and by him to them, does not, in my judgment, deprive them of the right of a bona fide purchaser.

It has been held that one who in good faith for a consideration and without notice accepts a conveyance by deed executed and delivered to his grantor by a prior owner in which the name of the grantee is left blank becomes a purchaser in good faith and acquires a good title as against the prior owner, although the deed was obtained by fraud in the first

place. (133 Ia. 456, 76 Ia. 529, 145 Ia. 591). In the cases cited, the original grantor was not present and acquiescing when the deeds were filled in with the names of the innocent third persons. Certainly the case is stronger in favor of the purchaser where, as here, the grantor was present and consented to the deed being made direct to such purchaser.

In *Torrey vs. Buck* (2 N. J. Equity, 366) so much relief upon by plaintiffs, the facts are not very clearly stated in the opinion. Enough is stated, however, to indicate that the person to whom the land was conveyed at the request of Buck was not in fact, a purchaser in good faith.

In *Bonnell vs. Burton* (61 Ore. 429) the defense of innocent purchaser was not made or considered.

It follows therefore that the bill should be dismissed and it is so ordered.

August 11, 1913.

Filed August 11, 1913.

A. M. CANNON, Clerk.

And afterwards, to wit, on Monday, the 11th day of August, 1913, the same being the 31st Judicial day of the regular July term of said Court; Present: the Honorable R. S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[Final Decree]

*In the District Court of the United States for the  
District of Oregon.*

FRANK L. TOBEY et al.

Complainants.

*vs.*

W. E. DE LARM, EDWARD C. KILBOURNE,  
CHARLES E. KILBOURNE et al.

Defendants.

DECREE.

It is hereby ordered, adjudged and decreed that complainants' bill be dismissed for the reasons stated in the opinion this day rendered, and that defendants Edward C. Kilbourne and Charles A. Kilbourne recover their costs and disbursements herein taxed at \$190.50.

R. S. BEAN, Judge.

Dated Portland, Oregon, August 11th, 1913.

Filed August 11, 1913.

A. M. CANNON, Clerk.



And afterwards, to wit, on the 7th day of February, 1914, there was duly filed in said Court and cause, a petition for appeal, in words and figures as follows, to wit:

[Petition for Allowance of Appeal]

*In the District Court of the United States for the  
District of Oregon.*

FRANK L. TOBEY et al.

Complainants.

*vs.*

W. E. DE LARM, EDWARD C. KILBOURNE,  
CHARLES E. KILBOURNE et al.

Defendants.

To the Hon. Robert S. Bean, District Judge, of the  
District of Oregon:

The above named plaintiff feeling themselves aggrieved by the decree made and entered in this cause the 11th day of August, A. D. 1913, do hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in their assignment of errors, which is filed herewith, and they pray that their appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit sitting at Portland, Oregon.

And your petitioner further prays that the proper

order touching the security to be required of him to perfect his appeal be made.

A. C. WOODCOCK,

JOHN M. WILLIAMS.

Solicitors for Claimants and Appellants.

Filed February 7, 1914.

A. M. CANNON, Clerk.

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And afterwards, to wit, on the 7th day of February, 1914, there was duly filed in said Court and cause, an assignment of error, in words and figures as follows, to wit:

**[Assignment of Error]**

*In the District Court of the United States for the  
District of Oregon.*

FRANK L. TOBEY et al.

Complainants.

*vs.*

W. E. DE LARM, EDWARD C. KILBOURNE,  
CHARLES E. KILBOURNE et al.

Defendants.

And now, on this the 7th day of February, A. D. 1914, came the complainants and appellants by their solicitors Woodcock, Smith & Bryson and Williams & Bean, and says that the decree entered in the above cause on the 11th day of August, A. D. 1913, is erroneous and unjust to complainants and appellants.

**I.**

The court erred in entering a decree in favor of

the defendants dismissing the plaintiff's complaint.

## II.

The court erred in not finding that the defendants made the representations complained of in the complaint; that the representations were false and fraudulently, made with intent to deceive and defraud the plaintiffs out of their lands and personal property and that the plaintiffs relying upon the said false and fraudulent representations traded their lands and personal property as described in the complaint for the bonds of the Columbia River Orchard Company, as set out in the complaint; that the defendants knew the said representations were false and fraudulent and made them recklessly with intent to cheat and defraud the plaintiffs, and that the plaintiffs, E. C. and C. A. Kilbourne, had knowledge of the said fraud and knew the facts concerning same and had knowledge sufficient to put them upon inquiry concerning the same and were parties thereto.

## III.

This suit was instituted by the complainants and appellants against the defendants Charles A. and E. C. Kilbourne, and other defendants who were connected with them in the transactions charged in the bill of complaint and brought out in the evidence for the purpose of setting aside a conveyance made by the complainants and appellants herein to the defendants and respondent E. C. Kilbourne. The charge against the Kilbournes was that the complainants and appellants transferred their property

including a large farm of 4350 acres together with personal property with which said farm was equipped, the value of which was in the neighborhood of \$120,000.00. In consideration of the transfer of said lands and said personal property there was turned over to the complainants and appellants what was called Columbia River Orchard bonds, the face value of which was \$140,000.00. The bonds bore on their face representations to the effect that they were secured by good and valid security amounting to 125 cents on the dollar for each dollar's worth of the par value of said bonds. The proof in the case showed that the bonds had no security of any consequence. There were several corporations organized by the same people who were transacting business with the Kilbournes, including the Columbia River Orchards Company, Washington Irrigation and Fruit Company, Oregon-Washington Trust Company; that the various corporations, one or the other had options on some land in and about what is called the Wahluke Project in Grant County Washington, the purpose ostensibly being to put water on the land so as to irrigate the same; the project was never completed. The various corporations mentioned had no title to any of the lands, all of which was supposed to be behind and as security for the said bonds referred to, and their whole title depended upon whether they would fulfill the contracts which they had entered into to the effect that they should put water onto the lands;



all of these facts were fully established at the trial and were undisputed.

The Oregon and Washington Trust Company, were guarantors for the payment of the bonds and held some so called securities known as water mortgages, which security was of no value and depended all together on whether the companies would put water on to the land, which they failed to do and rendered the same absolutely valueless finally, but they had no value in the beginning. The companies also had some contracts of purchase which they claimed were securities for the bonds which depended for their validity on future payments and future acquisition of the lands in the Wahluke project by the companies. The testimony in this case shows and which is undisputed that the Kilbournes the only necessary defendants in the case had entered into a contract with what was called the DeLarm outfit, which included all of the corporations mentioned, and testified to in this case. The contract in a general way provided that the Kilbournes were to carry out the plan which had been formulated by the DeLarm people to put water on to the lands, the result was that the DeLarm outfit was unable to raise money and the Kilbournes ceased to do further work in developing the project, and the Kilbournes testified the reason they quit work in carrying out the contract was that they were unable to work without money.

The bonds the complainants and appellants received, was a part of a large issue and issues of bonds

which the DeLarm outfit caused to be put into circulation, and the bonds had no market value at the time that the complainants took the same for the land and property as above referred to, and the Kilbournes testified on the stand that the DeLarm outfit undertook to dispose of the bonds in the East and when they failed to do so they then wholly abandoned the continuance of their contract with the DeLarm outfit and doing the work which was to be done. This all occurred about eight month prior to the time that the trade was made with the complainants and appellants, and the Kilbournes resided in the City of Seattle, where the principal business was done with the DeLarm outfit, who were promoting the Wahluke proposition. The Kilbournes testified they knew that the DeLarm outfit had no money with which to buy land at the time the deed was made by the Tobey's to E. C. Kilbourne, and they knew that they had no resources other than these bonds with which to secure the property; they knew that the DeLarm outfit had quite a while prior to that time exchanged bonds for property in the City of Seattle and other places. The excuse made, as the evidence shows in this case for Chas. A. Kilbourne, participating in the transaction was that he had loaned his company, known as the Kilbourne & Clarke Company, a large sum of money which the company was unable to repay, and there is no evidence in the case to show why E. C. Kilbourne should have an interest in the property turned over by the

complainants or that he paid any consideration for the same at any time. The testimony in the case further shows that after the land had been conveyed to the Kilbournes by the complainants that they still continued to deal with DeLarm directly and to that end they secured a loan from Cyrus F. Clapp, and H. E. Lutz, the principal of which was \$17,500, but they paid a commission of \$5,000, for the purpose of securing a loan and that DeLarm received whatever net proceeds there was left after the commission was paid. The excuse that the Kilbournes made was, in reference to that transaction, that they allowed DeLarm to do this for the purpose of avoiding a contract which they claim they still had to perform to construct what they called an additional unit to the pumping plant.

The complainants claim that the Kilbournes were on the ground at the inception of the Wahluke Project and were the principal contractors and were necessarily both by direction and implication familiar with all the financial transactions of the DeLarm outfit; they had a large contract to complete and the evidence shows they are skillful business men and would necessarily inspect and investigate the financial condition of the DeLarm people, before they would enter into such a contract.

Based on the evidence and as a conclusion the facts are that they were all broke, both the DeLarm people and the Kilbournes, and in their desperate

effort to get money they used these bonds, and were dividing the proceeds among themselves.

This assignment of error is set out at some length for the reason of advising the court of what the complainants and appellants claim the court erred in, in arriving at its final conclusion. It is claimed that the court erred in not weighing or determining the weight of the testimony and disregarding the facts as set forth in this particular assignment of error and the numerous details of evidence connected therewith, but if the court had considered the evidence in its true light as claimed by the appellants there is only one conclusion that the court could arrive at, it would have been found that the Kilbournes were not innocent purchasers, but were parties to the fraud perpetrated by the DeLarm people and were familiar with all the transactions before they took place. The evidence further shows that no consideration whatever passed from either of the Kilbournes to the complainants and the deed was made to E. C. Kilbourne at the special instance and request of the DeLarm people.

Wherefore the complainants and appellants pray that the said decree be reversed and that the Court of Appeals render a proper decree on the records herein.

A. C. WOODCOCK,

JOHN M. WILLIAMS,

Solicitors for Complainants and Appellants.

Filed February 7, 1914.

A. M. CANNON, Clerk.



And afterwards, to wit, on Saturday, the 7th day of February, 1914, the same being the 81st Judicial day of the regular November Term of said Court; Present: The Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

[Order Allowing Appeal]

*In the District Court of the United States for the  
District of Oregon.*

No. 5611.

FRANK L. TOBEY et al.

Complainants.

*vs.*

W. E. DE LARM, EDWARD C. KILBOURNE,  
CHARLES E. KILBOURNE et al.

Defendants.

ORDER.

This cause came on to be heard on this 7th day of February, 1914, on the petition and application of the above named complainants, Frank L. Tobey, Retta M. Tobey, Augusta M. Tobey and William L. Tobey, through their solicitors John M. Williams and A. C. Woodcock, praying and asking that an appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment and decree rendered in this cause by this Court, on the 11th day of August, 1913, said cause to be heard either at San Francisco, California, or in the City of Portland, Oregon, as may be ordered; and as-

signments of error having accompanied said petition and application of said complainants:

It is therefore, Ordered, Adjudged and Decreed that said appeal be allowed, and that the complainants furnish a good and sufficient bond, to be approved by this Court, in the sum of Five hundred dollars (\$500).

Dated this February 7th, 1914.

R. S. BEAN,  
Judge.

Filed, Feb. 7, 1914.

A. M. CANNON,  
Clerk U. S. District Court.

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And afterwards, to wit, on the 9th day of February, 1914, there was duly filed in said Court and cause a Bond on Appeal, in words and figures as follows, to wit:

**[Bond on Appeal]**

*In the District Court of the United States for the  
District of Oregon.*

FRANK L. TOBEY et al.

Complainants.

*vs.*

W. E. DE LARM, EDWARD C. KILBOURNE,  
CHARLES E. KILBOURNE et al.

Defendants.

**BOND.**

*Know All Men by These Presents,* That we, Frank L. Tobey, Retta M. Tobey, his wife, Augusta M. To-

bey and William L. Tobey, as principals, and E. O. Tobey, as surety, are held and firmly bound unto Edward C. Kilbourne and Charles A. Kilbourne in the full and just sum of five hundred dollars (\$500), to be paid to said Edward C. Kilbourne and Charles A. Kilbourne, their attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of February, in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately, at a session of the District Court of the United States for the District of Oregon, in a suit pending in said Court between the said Frank L. Tobey, Retta M. Tobey, Augusta M. Tobey and William L. Tobey, complainants and appellants, and Edward C. Kilbourne and Charles A. Kilbourne, et al, respondents, a decree was rendered against the said complainants Frank L. Tobey, Retta M. Tobey, Augusta M. Tobey and William L. Tobey, and the said complainants having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree of the aforesaid suit, and a citation directed to the said Edward C. Kilbourne, Charles A. Kilbourne, et al, is about to be issued, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at Port-

land, Oregon, or at San Francisco, California.

Now, the condition of the above obligation is such that if the said complainants shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their appeal good, then the above obligation is to be void; otherwise to remain in full force and virtue.

(Seal)

AUGUSTA M. TOBEY.

By John M. Williams, her Atty.

(Seal)

RETTA M. TOBEY.

By John M. Williams, her Atty.

(Seal)

FRANK L. TOBEY.

(Seal)

WILLIAM L. TOBEY.

Principals.

(Seal)

EDGAR O. TOBEY.

Surety.

Sufficiency of surety on the foregoing bond approved, this 9 day of February, 1914.

R. S. BEAN,

Judge.

Filed Feb. 9, 1914.

A. M. CANNON,

Clerk U. S. District Court.



And afterwards, to wit on the 7th day of March, 1914, there was duly filed in said Court and cause, a citation on appeal, in words and figures as follows, towit:

**[Notice of Appeal with Acknowledgment  
of Service]**

**CITATION ON APPEAL.**

United States of America,  
District of Oregon—ss:

To Edward C. Kilbourne, Charles A. Kilbourne, W. E. DeLarm, Columbia River Orchards Company, a Corporation, Oregon & Washington Trust Company, Trustee, of Portland, Oregon, and the Washington Orchard Irrigation & Fruit Company, a Corporation, Greeting:

Whereas, Frank L. Tobey and Retta M. Tobey, his wife, Augusta M. Tobey and William L. Tobey have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 9th day of February, in the year of our Lord, one thousand nine hundred and fourteen.

R. S. BEAN,  
Judge.

United States of America,  
District of Oregon.

Due and legal service of the within citation is hereby acknowledged in Multnomah County, Oregon, this 9th day of February, 1914, on behalf of the appellees Edward C. Kilbourne and Charles A. Kilbourne by receiving a copy thereof.

WOOD, MONTAGUE & HUNT,  
Attorneys for Defendants and Appellees Edward C. Kilbourne and Charles A. Kilbourne.

Filed March 7, 1914.

A. M. CANNON, Clerk.

And afterwards, to wit, on the 2nd day of October, 1914, there was duly filed with the Clerk of said Court, a transcript of testimony on appeal and on the 4th day of November, 1914, the same was filed in said Court and cause, approved, in words and figures as follows, to-wit:

[Abstract of Evidence]

*In the District Court of the United States for the  
District of Oregon.*

5611.

FRANK L. TOBEY and RETTA M. TOBEY his  
wife, AUGUSTA M. TOBEY, and WILLIAM  
L. TOBEY,

Complainants,

*vs.*

W. E. DE LARM, EDWARD C. KILBOURNE,  
CHARLES A. KILBOURNE, J. ALEXANDER  
WAKEFIELD, CYRUS F. CLAPP, H. E.  
LUTZ, W. J. BURNS, THE EDINBURG AND  
PACIFIC COAST MORTGAGE AGENCY LIM-  
ITED, COLUMBIA RIVER ORCHARDS COM-  
PANY, a corporation, OREGON-WASHING-  
TON TRUST COMPANY, of Portland, Oregon,  
Trustee, a corporation, and THE WASHING-  
TON ORCHARD IRRIGATION AND FRUIT  
COMPANY, a corporation,

Defendants.

TRANSCRIPT OF TESTIMONY ON APPEAL.

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Lodged with me October 2, 1914.

G. H. MARSH, Clerk.

Filed November 4, 1914.

G. H. MARSH, Clerk.

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W. L. TOBEY, a witness called on behalf of plaintiffs, and being first duly sworn, testified in substance as follows:

That I am one of the plaintiffs; am 52 years old; a merchant; and reside at Merlin, Oregon. That I am one of the persons who were joint owners of the lands described in the complaint. That I formerly resided in Gilliam County and went there in the spring of 1898.

That I am a brother of defendant Frank L. Tobey; that *Rita M. Tobey* is Frank's wife and that defendant *Augusta M. Tobey* is my mother.

That the amount of land involved in this case is a fraction of an acre less than 4350 acres. That the land was listed for sale with the Northwest Exchange, a real estate firm, at \$25 per acre. This was in January or February, 1911. There were three members of the real estate firm, Mr. Sherlock and two others.

That Mr. Sherlock called me up after the lands were listed and told me that he had a bond proposition to submit. That he called Mr. Humphrey to his office. That I had never met Mr. Humphrey



(Testimony of W. L. Tobey)

and found later that Humphrey occupied an office with Mr. Hodges.

Mr. Humphrey gave me a general outline of the proposition up there at Wahluke and what securities were behind them. Humphrey said that the bonds were issued by the Columbia River Orchard Company and guaranteed by the Washington Orchard Irrigation and Fruit Company. Humphrey didn't tell us much about the project at that time. Afterward, in a general way, Humphrey told me that they had quite a large holding of land there that they had titles to and that they were selling these lands.

Humphrey said that the securities behing the bonds were 125 per cent of the bonds in real estate mortgages and as additional securities 125 per cent of sales contracts on these lands; and that the Washington-Oregon Trust Company held these securities.

I went from Mr. Sherlock's office with Humphrey over to Hodges' office and met Hodges.

Mr. Humphrey represented that their ditches they had been working on would give them something like 7000 or 8000 acres. He said they had options on something like 10,000 acres, had it under their control. Humphrey said they were selling the land at \$350.00 an acre on contract with a payment down. Mr. Humphrey gave a general outline of the pumping plant, what they were doing, the work being done on that, their ditches, how they were getting the water on the lands, etc., and that they were to put water on

(Testimony of W. L. Tobey)

the land at \$350 per acre. That the 10,000 acres they had options on was Northern Pacific Railroad land.

Mr. Humphrey and Frank Tobey went to Mr. Hodges' office with me and Mr. Hodges went over the proposition with me much more than Mr. Humphrey did.

Mr. Hodges said they had real estate mortgages to the amount of 125 per cent; also sales contracts to the amount of 125 per cent of the bonds issued. That the contracts were on lands that they had sold in this project at \$350 per acre with a contract to put water on the lands. Mr. Hodges said they owned about 4000 acres in the project, and that they had options on about 10,000 acres of Northern Pacific Railroad land in addition to the 4,000 acres that they owned and had title to. Hodges didn't say which company owned the title to the Wahluke plant.

Hodges said the bonds were issued by the Columbia River Orchard Company and were guaranteed by the Washington-Orchard Irrigation & Fruit Company, and I was of the impression that Hodges said the Washington Oregon Irrigation & Fruit Company owned the title to the land within the project.

I was not shown any of the securities claimed to be behind the bonds but Hodges said he, Hodges, held them as trust officer, and afterwards told me that they were in a deposit box at the hotel where he was rooming. Hodges never offered to show the securities to me.

(Testimony of W. L. Tobey)

Hodges used every effort in trying to make the proposition, bonds and securities look good. He had maps of the project and photographs of the ditch and pumping plant and of the work that they were doing. Hodges said DeLarm and Biehl were back of the project and that he would get Mr. DeLarm down from Seattle to explain it further.

Two or three days afterwards Mr. DeLarm came down and we met him at Mr. Hodges' office. Mr. DeLarm told us about the securities just the same as the other two had; that they had 125 per cent of real estate mortgages as security for the bonds and a guaranty by the Fruit Company. In a general way he said that some of the mortgages were on those lands at Wahluke, and some were not; that they had mortgages on other lands beside what was in that project. He didn't explain their character more than that they were first mortgages on real estate. I asked him about that. I did not ask to see the securities at that particular time. Mr. DeLarm said about the same as the others, that they had about 4000 acres and options on about 10,000 acres of railroad land. DeLarm said that the sales contracts were for lands sold at \$350 per acre. Myself and my brother Frank were present and Hodges was in and out of the office during this conversation. Mr. DeLarm explained the general nature of the project and the irrigation system. He had maps, photographs and a general outline of their work, what they were do-

(Testimony of W. L. Tobey)

ing, how they were building their ditches, where their pumping plant was located, and a general idea of how it was conducted, how it was being built. This conversation lasted for several hours. He said that the ditch they were then digging would put water on seven or eight thousand acres. DeLarm said that the bonds were 20 year bonds. That their plans then were that they would create a sinking fund from a certain per cent of moneys received from the sales of land, and that they estimated that in about seven years, they would be able to retire the bonds to pay the bonds off. He stated that he had 125 per cent mortgages and 125 per cent sales contracts behind the bonds, making a total of 250 per cent, and that the Washington Oregon Irrigation & Fruit Company guaranteed the payment of the bonds I think he said and that this company was the owner of the land.

The next arrangement was for them to go up and see the ranch in Gilliam County. DeLarm said, of course, that he would want to see the land; that he didn't pretend to be a judge of farm land values, etc., and that he had an acquaintance there in Seattle that he wanted to go with him to use his judgment on the land. Within one or two days after that, we went to the ranch. Mr. DeLarm and Mr. E. C. Kilbourne and I went up. Frank was at the ranch at that time. He had gone on ahead. Mr. DeLarm said he wanted Mr. Kilbourne along to use his judgment. He would



(Testimony of W. L. Tobey)

rather trust to his judgment on the character of the soil, and the values, etc., than to use his own. That he didn't know much about farm values and property. We left Portland about 10 o'clock in the evening and traveled at night. We got to Arlington about one or two o'clock in the morning and started to the ranch between six and seven o'clock and got out there about ten o'clock, and *staid* there until perhaps the middle of the afternoon.

Mr. Kilbourne, Mr. DeLarm and I rode over the ranch; that is, over part of it, before noon; over the east portion of the ranch, inspected it, and got to the buildings in time for dinner. Mr. Kilbourne got out and looked at the soil; looked at the grain on the ground, etc. As we were driving through the field occasionally we would stop and look and examine. We got back to the house just about dinner time; had dinner there. After dinner we went out and went around the buildings, looked at the stock; there was some stock being worked. We all looked at the stock, Mr. Kilbourne, Mr. Hodges, Mr. DeLarm, my brother and myself and our foreman, Jones. I presume to say that we were around the buildings there looking over the stock and machinery and different things perhaps, I should think possibly an hour. All of the personal property mentioned in the schedule attached to the bill of complaint was there, unless it might be possible there might be a team that was out on the work somewhere, something like that, but I



(Testimony of W. L. Tobey)

think everything was right there. The combined harvester was in a building separate by itself, about a quarter of a mile from the other buildings. We went up there and looked at that. The stables are about three or four hundred feet from the house. Do not know whether the caterpillar engine was at the building or out in the field at that time. He looked over the horses and mules. The horses and mules that were at work were in the stable, of course, being fed at noon. The balance of them, most of them, at least, were in the yards at the buildings.

We had not entered into a contract at that time, but we had talked that we would keep part of the stock. Nothing was said at that time about what the stock was worth. No particular item of it was discussed more than to say, he thought we had a fine bunch of animals there, mules.

Mr. DeLarm took very little interest apparently and did very little talking. What little talking was done was done mostly by Mr. Kilbourne. We went back to town that evening. We left Arlington early in the evening. Nothing was said particularly on this trip what we were to get for the place.

On the trip back home, of course, we wanted to know something about what their decision had been and I asked the question if they had found the place about as I represented, and they said yes, that the place was as good or better perhaps than they expected to find, about as represented. They both said that.

(Testimony of W. L. Tobey)

We entered into a contract with DeLarm on the 25th day of February, 1911. I have a copy of the contract. After that I arranged to go to Seattle to investigate their proposition. I went to Seattle to see Mr. DeLarm and to investigate the proposition, bonds, etc. I saw Mr. Biehl; was in the office. They went over the entire project again; showed me maps of it, photographs, and there they showed me some sales contracts, and notes for sales they had made at Wahluke.

They referred me to several different ones; amongst them were A. C. Gunn and a man by the name of Morrison. I went into Mr. Morrison's office; talked with him. I asked him what he knew about their proposition, the bonds, securities, etc., and he pointed to a safe in the corner of the room and he said, "I have several thousand of their bonds in that safe." He said, "I am holding them as an investment and I consider them perfectly good. He spoke of their project at Wahluke as being good; spoke very favorably of it every way. He said that he considered DeLarm and Biehl good men, that were reliable, and that were capable of handling it and putting through this proposition.

I spent quite a little while in Mr. Gunn's office, probably an hour or more. He went over the entire proposition, said that he had investigated it probably more thoroughly than any one else had on the outside, and he made the same remark about having

(Testimony of W. L. Tobey)

some bonds that Mr. Morrison had made. He didn't state how many he had, but he had quite an amount of the bonds that he owned, and was holding them as an investment, and he spoke of their securities, their mortgages and sales contracts; that he had investigated them, and he made the remark that he would consider, even if the company went into the hands of a receiver, that their securities back of the bonds would be sufficient to pay out 80 or 85 cents on the dollar of the issue at that time. He said the securities were real estate mortgages and sales contracts, 125 per cent of each. That is the only two individuals I saw. I went to see one attorney, I couldn't tell his name, wouldn't know it if I was to hear it now, to get the information, but I could get none from him at all. You might say he practically said that it took money to get information from him; that he had nothing to give away.

I went to two banks there. I went to the Dexter Horton; I think that is the name of the bank—National Bank, and they said that their banking rules were such that they could give no advice or information regarding investments. Couldn't get any information from them. The Mercantile Bank told me practically the same thing that the other bank had told me; could get no information from them. They are the only ones I saw there, was there one day.

Of the time I was there investigating it, I prob-

(Testimony of W. L. Tobey)

ably spent half of the time in DeLarm & Biehl's office, several hours. Mr. DeLarm impressed me quite favorably, being a bright young man, a man that inspired confidence. I had a great deal of faith in him from talking with him.

After coming back from Seattle, from what information I could gather, I decided that the bonds weren't worth par, and we decided to turn down the contract that we had entered into, for the reason that I didn't think we were getting value received for our ranch. I was influenced to that from the statement Mr. Gunn had made that the securities back of the bonds would probably pay out 80 or 85 cents. We were getting 120,000 in bonds on the first contract.

We entered into negotiations for a further contract. A few days after my return from Seattle. Mr. DeLarm came down, and then we made another contract. Contract identified and admitted in evidence marked Plaintiff's exhibit 1.

The contract calls for \$141,000.00 140,000 in bonds and \$1000 in cash and witness was asked to explain the \$1000.00.

We had some supplies, such as groceries, in the house, and wood. We had just shipped a car of wood and quite a lot of that was on the ground, and some engine oil, distillate, etc., and grain; supplies of that kind that we had, that we asked for this \$1000.00 as partial payment for that stuff. All of that stuff represented cash.



(Testimony of W. L. Tobey)

Mr. DeLarm was in Portland in Mr. Hodges office at the time we were negotiating for the contract and I couldn't say for sure whether it was completed on the 4th of March, all in one day, or whether we talked it over for a part of one day and completed it the next.

We were induced to take these bonds from the representations made to us by DeLarm and Biehl and Hodges and Gunn and Morrison and the different ones that we had talked to. These were the only ones we obtained information from, and I believed those representations, and being asked whether or not he relied upon these representations in making the contract, witness said, "I certainly did, yes. That is the only thing I had to rely upon—was their statements."

I never was at Wahluke and had never been on the project.

The deeds were made on the 15th of March, the day they bear date, and were made out in Mr. Hodges' office. I think Mr. Brazell made them out. Mr. Brazell, I think, was a stockholder in the company. Mr. DeLarm, Mr. Hodges, Mr. Brazell, Mr. E. C. Kilbourne, my brother and myself were present at that time, and Frank's wife was there to sign them. She came down there. The bonds were present in the office when the deeds were signed and we counted them over to know that they were all there. At the time of signing the first contract, the contract for the \$120,000.00 sale, they gave us \$3000.00 of bonds and

(Testimony of W. L. Tobey.)

we had them at that time and counted them up to see if all were there. Mr. E. C. Kilbourne was present when we were counting the bonds. The deeds and bonds were done up in a package and placed in escrow in Hartman Thompson's bank. Mr. Hodges and I went there with them. They were put in escrow, because there were some defects or something about the title that Mr. Kilbourne objected to. The deed was made to E. C. Kilbourne at Mr. DeLarm's request, at the time we started to have the deeds drawn up. When we got that far with the proposition, he said that he was having the lands deed to Mr. Kilbourne. Mr. DeLarm said, in the course of our conversation, regarding his proposition, that he was aiming to raise money to promote his scheme up there, and when he wanted to trade for our ranch up there, I asked him how he could use that land to pay the debts and he said, "I have got a place for this property before I buy it. If I didn't have I wouldn't want it, but I know right where it is going." Mr. Kilbourne's name was not used before the 15th of March with reference to the deeds, not until the time of making out the deeds. The deeds and bonds remained in escrow about eight or nine days, something like that. In the meantime, to meet the objections of Mr. Kilbourne, to the title we went to Mr. Chamberlain's office, an attorney here in Portland who was examining the titles, to see what his objections were and to make arrangements to correct whatever defects

(Testimony of W. L. Tobey.)

we found in the titles. He was acting for Balfour-Guthrie Company, or the parties who were making this \$20,000 loan, whoever it was. He made the objection to Mr. Kilbourne after the deeds were put in escrow, because at that time they had wanted to know that there were no faults with the titles to the land. There was an agreement drawn up at that time, on the 15th of March, in regard to the escrow. It was drawn by Mr. DeLarm or by his instructions.

The agreement identified and introduced in evidence as Exhibit No. 2.

When Mr. Chamberlain was satisfied in regard to the title, the deeds were delivered and we took the bonds. As near as I can tell, the deeds were delivered about the 24th of March. I am not sure that I could tell just whose hands the deeds were delivered into. I was present when the deeds were taken from the bank and Mr. Hodges was with me. We went to Mr. Hodges' office and I could not say whether there was anyone else or not, more than the stenographer, at that particular meeting. I couldn't say for sure whether Charles A. Kilbourne was in town or not on the day the deeds were delivered. He was there when they were made out. I couldn't say for sure into whose hands the deeds were delivered, whether Mr. Hodges took possession of those deeds at that time or not. I don't recollect about that.

The deeds and bonds were exchanged at the same time when they were taken out of the bank, out of

(Testimony of W. L. Tobey.)

escrow. I took the bonds and they took the deeds, whoever it was. I know Mr. Hodges was there but whether anyone else was there or not, that is the part I don't recollect.

In the contract of March 4th mention is made about a loan that we were to have a loan of \$6000.00. Eventually that was carried out. Not at that particular time but afterwards we made the loan.

Exhibit 3 identified as contract having been made between the parties on the 15th day of March, and introduced in evidence.

In regard to the second payment of \$3000.00, the second \$3000 was paid by Mr. Hodges. It was not all paid at one time. At first a \$500 check was sent by DeLarm. We put that in the bank, Ladd & Tilton's bank, and it was returned "No funds" for payment before it went to protest. We got the \$500 after two or three weeks back and forth, working over it. At last we got him to come through and pay it and later Hodges paid us the balance of \$2500. The first \$300.00 was paid on the 15th of March. I think that was the date of it. We made notes for that. They were made payable to the Oregon & Washington Trust Company.

When we were discussing the question of the Wahluke project with Mr. DeLarm, he made representations to us about the quantity of bonds outstanding at that time. Before we received the bonds he said there were about 300 or 325 thousand out at that



(Testimony of W. L. Tobey.)

time, face value. In the course of the conversation that would come up, he made the remark that they had about \$300,000.00 of bonds then issued. That statement was made in his office in Seattle the day that I was in his office. I couldn't give the exact date. It was only a very short time, not more than a day or two, two or three days, before the date of the contract, early in March. It was sometime between the 24th of February and the 4th of March.

I first came to Gilliam County in 1898. I came first and went into the mercantile business, a store. We acquired the first land there, I would say, possibly some three years after my first coming to Oregon. That is the first land we bought in the county. We bought the last land, I think, in the year 1910, 160 acres. At different times we have bought different amounts. We had bought at another time 160 acres, at another time 2400 acres, about three years after my first coming to Oregon, as near as I can remember. Frank was with me at that time and we bought it together. We farmed the land, I should say about eight years, but I am not sure as to that. The place was rented in 1909 and 1910 to John Chandler. He carried on the place for one year and transferred the lease to a man by the name of Wade. Mr. Wade farmed it two years. We rented it for grain rent, a portion of the crop. We got possession of the place from Mr. Wade the first of November, 1910.

Mr. Wade had about 1500 acres of land plowed on

(Testimony of W. L. Tobey.)

the place. We were living in Portland while Mr. Wade had the land. We were not up there very often during the time it was rented.

I was familiar with land values in that neighborhood during February and March, 1911, pretty well. The reasonable value of the land and farm equipment at that time would be \$120,000.00. The equipment would reasonable be worth \$17,500 or \$18,000. Being asked to state why he put it as low as Fourteen to fifteen thousand dollars in the complaint, he said "Simply because I did not take the necessary time to go over each item on the place and make an accurate estimate of its value."

I was living in Southern Oregon, Merlin, at the time the bill of complaint was drawn and gave the necessary information to Mr. Woodcock. I received a letter from him asking for the reasonable value of the farm implements, stock, etc., on the place. I didn't spend but a very short time in figuring on it, was busy in the store and didn't go over it as thoroughly as I should have done. I have figured more accurately since that time. To replace everything new there, it would cost over \$25,000.00. In making the estimate of seventeen to eighteen thousand dollars I took into consideration the wear of what was on the place at that time.

I couldn't state exactly how much land was under cultivation because it never was surveyed, but as near as we could tell, about four thousand acres.

(Testimony of W. L. Tobey.)

That would leave about 350 acres waste land, that is, land that can't be cultivated, wouldn't be suitable for plowing. It is valuable for pasture for *that* stock we have got to have. We have got to have pasture for them when not working.

We had the caterpillar engine mentioned in this list of personal property just a short time. We bought it in the fall before selling the place. We paid \$4000 in Stockton, California, for it. I think the freight was \$120.00. We had just bought the engine gang plow at about the same time as buying the engine, during that winter. We had the Holt harvester five or six years. Three of the disks we bought during that winter; never had been used. One of them was bought a short time before that, I can't tell just how long but not long before.

I don't think that I could tell just the number of feet they cut but I think about ten feet. I wouldn't be sure of that. They cost us either \$105 or \$110 each. Some of the harness was in good condition. There was some new harness, that is practically new, not right new, but that was in good condition, and there was from that down to, you might say, poor. We were buying more or less nearly every year.

The horses and mules together would be worth \$135 or \$140 per head. I did not include the bunk house in my estimate of seventeen or eighteen thousand dollars. I did not include the pump house but the pump I did include, because that was new.

(Testimony of W. L. Tobey.)

We had bought that just a very short time before. The pump and pump jack, as I remember, were about \$2000.00. The well was 192 feet deep. I included the tools in the blacksmith shop in the estimate but not the building. Did not include the reservoirs nor the barns nor the windmill nor the headquarters house nor the stock and stock barns. I did not take into consideration any buildings that were on the place in making that estimate.

The fencing on the land was mostly three wire fence with cedar poles, a little two wire fence and a number of rails. It would be very hard for me to state but I would make an estimate of 15 miles of fencing on the place, but that is something I couldn't because I never thought of it in that light. The state of the ground that Mr. Wade plowed in the fall of 1910, was in very good condition, fairly well cultivated. There was grain sowed on the place when it was turned over to Mr. Kilbourne. Of course, in giving this answer it will have to be an estimate, because we do not know exactly the number of acres in any piece, but as near as I could tell, about 1,300 acres. That was fall seeding and we were getting ready to do some spring seeding. I am not sure at that time whether the seeders were being run or not, but I think they were. I think at that time they were seeding but I wouldn't be positive of that, whether they were seeding or finishing plowing. There was about 1,900 to 2,000 acres plowed on the place all to-



(Testimony of W. L. Tobey.)

gether when it was turned over to Mr. Kilbourne.

The value of the plowing, including the seed that was put on to the ground, I would say from \$2.50 to \$3.00 per acre. There was about 1,300 acres seeded and about 1,900 acres plowed and not seeded. I do not know that I could state just what they were receiving or charging for plowing at that time, although I will say to that, Mr. Wade the year before plowed a piece of land on the adjacent ranch and we got a part of the pay for it for having loaned him the stock and he got \$2.00 per acre for plowing. It would be well worth \$1.50 per acre anyway to plow. I can't state whether the equipment turned over to Mr. Kilbourne was sufficient to carry on the farming as a wheat ranch for this reason; we had just bought this caterpillar engine to take the place of a lot of the stock and you might say that was an unknown quantity. That is to say, we didn't know just how much of the work was going to be done with that and what was to be done with stock, but we aimed to hold stock enough on the place to work the place including the engine. We thought it would be sufficient to run the place.

We had no other property than what we had up there on the place. In answer to the question, "You may state whether or not at any time you asked either Mr. Hodges or DeLarm about what the securities were they claimed were behind the Columbia River Orchard Bonds?" witness answered, "Yes,

(Testimony of W. L. Tobey.)

I did, I asked them to see them.” “I asked Mr. Hodges once here in the office, I couldn’t say just when it was, but some time during the session, to see his security, but he always made the excuse that the securities were in a deposit box at the hotel, I think it was, where he was staying. He didn’t have them in the office because he had no vault or safe there. I asked him at different times before the deeds were made out to see the securities and he made the reply that the securities were not there in his office and that he had no safe there.”

The Court adjourned until tomorrow morning at ten o’clock.

Mr. W. L. Tobey recalled, continued his testimony.

Witness was asked this question: “You testified yesterday that you had listed your land with the Northwest Exchange at \$25.00 an acre. Did that include the equipment?” Answer: “No, sir; that was for the land only.”

Cross Examination.

(By Mr. C. E. S. WOOD.)

We did not learn that we had been defrauded in these bonds until the final climax came, about the first of February, not until they went into the hands of a receiver. That was about the first of February, 1912. The first we knew of it, we saw it in the paper. The interest on the bonds had not been paid. The interest was not due until the first of February

(Testimony of W. L. Tobey.)

and I think they went into the hands of a receiver before the first of February the interest coupons were due on the first of February and it seems to me that we saw in the papers of their failure before that date. Yes, I am sure that it was a little before the first day of February.

I never knew Mr. Sherlock, only after I met him in the office. I lived here in Portland at that time. I live now in Josephine County and my brother, Frank, lives in Josephine County now.

The Tobey ranch is near the town of Olex in Gilliam County. I went to Olex as a merchant, opened a business there. I first went to Arlington in the same county. My brother joined me, I think it was September following my going there. We were partners as merchants. Then we went from Arlington to Olex. That was in the year 1898. We continued the merchandise business in Olex for several years. My brother and I farmed this land personally. We only lived there, I think it was one year. I think perhaps it was part of two years but it would be one year's time as I remember it now. We farmed all of it. We called it about 4,000 acres of tillable land.

When we bought the land there were different prices. It wasn't all the same price; bought at different times. The land cost us anywhere from the neighborhood of \$11 to \$12 an acre. We accumulated this 4,000 acres in parcels. We bought it at

(Testimony of W. L. Tobey.)

different times and in different ways, different people. I think there were six different purchases. The smallest tract was about a 40 acre tract. There were more than six purchases. There were seven or eight or nine purchases, I think, varying from a 40 acre tract up to 2,400 acres. The lowest price we paid for any particular tract, as I remember it, was perhaps \$10. We purchased one piece of 160 acres from a man by the name of Ward. I think the price was about \$10.00. I couldn't state exactly. I couldn't give the year. We had had this quarter section of land possibly five or six years before we sold to DeLarm.

The highest price we paid for any one parcel, I would say about \$12. I think we bought a piece from a man by the name of Ramsey that would figure up \$12 as I remember it. I can't tell the exact date we bought that. Might have been perhaps the year 1903 or 1904. Something over 900 acres. This man Ramsey owed us in the store a small account that was applied as a part of the purchase price. The balance of it was cash, (*cash*) that is, cash payments. There was one 160 acre tract that was in the same condition, I think. I do not think we foreclosed any mortgage on any piece. That isn't my memory that we did.

The year Mr. Wade farmed it was 1909 or 1910, I think. It was on a crop rental basis. We got one-half of the crop rent. I couldn't give the figures as



(Testimony of W. L. Tobey.)

to how much we got. It would be impossible for me to answer that question. It was wheat, I think; he had both wheat and barley. I couldn't say how many bushels of wheat we got. It would be impossible for me to answer that question. I have no record of it.

A man by the name of Chandler had it rented another year on a crop rental, one half. I do not remember what we got out of that. I have no means of knowing whether Wade or Chandler made any money off of it or not, because I don't know what it might have cost them to operate it. Mr. Chandler transferred the lease to Mr. Wade and Wade threw up the lease. We never kept any record so as to know exactly to the dollar what we made. We didn't go behind on it, I can state that.

Witness was asked this question: "Why did you put it on the market to sell?" Answer: "Because we did not care to live in that country longer and we preferred to have our property where we were living. We had seen the advertisement of the Northwest Exchange in the paper and we were willing to give him a chance to sell it. Had no personal acquaintance there at all at that time and afterwards only as I would meet him in his office, is all I know about him. Sherlock was not part of the DeLarm crowd, as far as I know. His first report was in regard to these Columbia Orchard Bonds. He didn't tell me much of anything about them, because he said

(Testimony of W. L. Tobey.)

he didn't know much. He just stated it was some bonds and that he would have to call one of the men from the office to give us an outline of the proposition. He called Mr. Humphrey. I didn't know at the time where he was getting them; he said he would call in a man, and Humphrey put me in connection with Mr. Hodges.

Witness was asked this question: "And Humphrey and Hodges, as I understood you on direct, both told you about the same thing, that it was this irrigation scheme, and that they had security enough under it, so that if the scheme never went through, the bonds would be worth eighty cents—is that right?" Answer: "No, they didn't tell me that. I learned that while in Seattle. I was told that in Seattle. That 80 or 85 cents valuation I learned from Gunn over in Seattle."

The witness was asked: "What did Humphrey say to you about securities and values?" Answer: "Why, he represented that the bonds were secured by mortgages to the amount of 125 per cent; in addition to that sales contracts to the value of 125 per cent. I couldn't say that Hodges told me at that particular time who was trustee for the bonds. Mr. Hodges said that he was the trust officer. That is, I learned at Mr. Hodge's office that he was the trust officer. I couldn't give the exact date of that. That must have been in February of 1911.

I didn't hear any mention of the Washington Sav-

(Testimony of W. L. Tobey)

ings & Trust Company. In fact, I don't know that at that particular time, at our first meeting, I could say for sure whether there was any trust company mentioned or not. I don't know that we had got that far with the transaction as to inquire who the trust officers were at that particular time at that first meeting.

Witness was asked this question: "Wouldn't it be natural in dealing with bonds instead of money, that one of the first things you would say, is, who is the trustee holding and issuing these bonds? Don't you think that is natural?" Answer: "Well, that would come in the examination of the securities, but whether it did at that first meeting with Mr. Hodges, or not, I couldn't tell for certain. I can fix the time only in a general way. It would be my impression during the month of February. I should say at least a month, possibly a little longer than that, before we gave the deeds. After I met Humphrey, I met Hodges the same day and I am not sure whether the question came up on that day at all with either Humphrey or Hodges, about who was the trustee. I couldn't state positively whether that did come up at that time or not. They told us that the bonds were secured by 125 per cent securities. After talking with Mr. Humphrey and then Mr. Hodges, we arranged for a meeting with Mr. DeLarm. That took place within a few days. When we talked with DeLarm, Mr. Hodges and my brother were present

(Testimony of W. L. Tobey)

and I think that Mr. Humphrey was in and out of the office during the time.

Mr. DeLarm, in the conversation with him, made a report of what their securities were, of the mortgages and sales contracts the same as Mr. Humphrey and Mr. Hodges had done. He said that they were first mortgages on real estate and sales contracts for lands in this project. He indicated that the real estate, part of it was there upon the project and a part in other places; not necessarily all of it on the project. He didn't indicate where the outside property was. He said some of this mortgaged land was under the project. I do not know that we inquired just the location where the rest of it lay.

Question: Weren't you curious about the value of these securities?

Answer: Did I inquire about it?

Question: Did you inquire? If he told you that he had certain lands as security for the bonds, didn't you want to know all about it?

Answer: Why, of course, we would want to know about it.

Question: But you didn't ask at that time?

Answer: Why, he said that they were worth, the land in the project that he was backing the security on, he was selling the same class of lands for \$350 an acre.

Question: Yes, but the point I am getting at, did you ask him where is the land situated that you hold



(Testimony of W. L. Tobey)

mortgages on for security?

Answer: Why, yes. I answered that a part of it was on this project, and a part of it was the land in other places.

Question: Did you ask in what other places?

Answer: I didn't ask him to give me the exact legal descriptions of the property, no.

Question: Neither did you ask him to give the general locality?

Answer: No, I didn't at that time, no.

Question: Now, did you ask at this time who the trust company was that was acting, who pretended to issue these bonds as trustee?

Answer: No, I don't think that that came up at that meeting. I first learned who the trustee holding the bond issue was on my trip to Seattle. As I understood it, the Dexter Horton Bank, that it had been, but that it was being transferred at that time to the Oregon & Washington Trust Company of Portland. I couldn't give the exact date I was in Seattle. It was some time during the month of February, 1911.

Mr. DeLarm told me that they were establishing a trust, or transferring their trust to Portland. He said that the Dexter Horton Bank, or connected with the Dexter Horton Bank, had been acting as trustee at that time.

Q. Did you go there and inquire about that trust?

A. I went there to inquire about the proposition, yes, sir.

(Testimony of W. L. Tobey)

Q. Who did you see there?

A. I couldn't tell. I don't know the man's name that I saw now.

Q. Did you ask to see the trust officer?

A. I don't know whether I did or not.

Q. Did you go to the Dexter Horton National Bank, or to Dexter Horton Trust & Savings Bank?

A. I suppose it was the Dexter Horton National Bank.

Q. Did you tell them what your business was?

A. I told them that I wanted to get what information I could regarding the Columbia River Orchard Company bonds.

Q. And they didn't refer you over to their other bank that held the trust?

A. No, they did not.

Q. Did you tell them that you were thinking of buying some bonds?

A. I can't say whether I told them or not.

Q. Now, you said on your direct, that they said they weren't allowed, under their rules, to give advice or information on bond investments, didn't you?

A. I said that they gave me to understand that they had no information to give on investments and propositions of that kind; that they weren't in business to give any information.

Q. Now, that answer of theirs would seem to indicate that what you asked them was what the value of these bonds was. If you had asked them who

(Testimony of W. L. Tobey.)

was the trust officer for the Orchards Company, they would have had to tell you, and they would have had to refer you over, wouldn't they?

A. Well, I don't know. I didn't ask it in that way, I suppose.

Q. I am not trying to testify for you. I am trying to refresh your recollection. It looks from the answer that you say they gave, that they weren't allowed to make recommendations or give advice, as if you were asking about the value of the bonds. Wasn't that, now, what you asked them?

A. I was asking—I asked them in regard to the companies, to know something about their standing, etc.

Q. Well, about their standing; but you didn't ask to see the trust officer, or who held the trusteeship, where you could go to get the information on that head?

A. Possibly I didn't.

Q. Then what other bank did you go to?

A. I went to the Mercantile Bank, I believe is the name of it. I wouldn't be sure as to the name of it.

Q. They gave you about the same information?

A. About the same answer, yes, sir.

Q. So that would indicate that you were asking about bond values. You had no idea that Mercantile Bank was the trust company, did you?

A. Oh, no, no.

(Testimony of W. L. Tobey.)

Q. Well, you found from your inquiries over there that this bond issue had a pretty good reputation, didn't you?

A. I did.

Q. Mr. Gunn said he had some in his safe?

A. Yes.

Q. Who is Gunn?

A. Why, he is sort of a real estate man or broker, something of the kind, I think.

Q. And he is a broker, or real estate man, you say?

A. That is my impression that was his business.

Q. Who referred you to him—DeLarm?

A. DeLarm, yes, sir.

Q. Did you ask anyone else what kind of a man Gunn was?

A. Ask about Gunn?

Q. Yes.

A. I did not.

Q. Do you know now whether Gunn is a disreputable man, or not?

A. No, I do not.

Q. Who was the other man that you asked?

A. I inquired from a man by the name of Morrison.

Q. What is his business?

A. Well, I don't know, but I suppose he is a real estate man. But yet I don't know what his business is.



(Testimony of W. L. Tobey.)

Q. Well, was he in any way associated with DeLarm in business?

A. Not that I know of.

Q. I am not sure that I have my memorandum right on this, but did he also say he had some of the bonds?

A. Yes, sir.

Q. So they each said that they had some, and considered them a good investment?

A. Yes, sir.

Q. What did you learn were the actual—I don't mean the percentages, but what cash securities back of these bonds? You said something about their being mortgages, and you also, if I remember rightly, said something about there being water mortgages and contract sales. When did you first learn that these securities were supposed to be back of the bonds?

A. Why, at my first meeting here in Portland, with Hodges and Humphrey.

Q. Well, did you make inquiry over at Seattle concerning these securities?

A. No more than what I made in DeLarm's office.

Q. You were in Seattle all day?

A. That is, except of course,—now, then, Mr. Morrison and Mr. Gunn both said that the securities—gave the same report regarding the securities which they held, regarding the payment of these

(Testimony of W. L. Tobey.)

bonds.

Q. Have you any reason to believe, now, Mr. Tobey, that at the time you were inquiring there, these bonds, as far as issued, weren't perfectly good?

A. I don't know that I understand that question.

Q. Have you any reason to believe now, that at that moment, when you were over in Seattle, that the bonds that were then issued and outstanding by the Washington Savings and Trust Company weren't perfectly good?

A. No, I don't know at that time whether they were good or not.

Q. Well, all that you learned was favorable; they were good?

A. What information I got was that they were good.

Q. Now, I want to know if, since that date, anything has come to your knowledge that contradicts that, and will tell you that at that date they were not good?

A. Why, from reports I learned the securities that they gave weren't all valid securities. They were more or less forged securities.

Q. As far as the Washington Trust & Savings Company was concerned, have you any reason to believe that the securities deposited with it weren't good for the amount of bonds that were outstanding?

(Testimony of W. L. Tobey)

A. I don't know, because I don't know what was deposited with them.

Q. You are not familiar with what has been given in here?

A. No, not a thing, anything about what securities were given in.

Q. How many bonds at this time were outstanding?

A. At the time of our trade?

Q. At the time you were making the inquiry over at Seattle?

A. I don't know, only as DeLarm told me.

Q. What did he tell you?

A. He told me there was about 300,000 to 325,000 at that time issued.

I learned about the lands the company had at Wahluke at my first meeting with Mr. Humphrey, Mr. DeLarm & Mr. Hodges, 4000 acres, and an option on Northern Pacific lands for 10,000 acres. They may not have mentioned the 10,000 acres possibly at the very first meeting, but I knew of it when I was over in Seattle. I learned it before our trade was made.

Q. Did you make any inquiries of the Northern Pacific Land Office to know whether that was so?

A. I did not.

Q. Did you ever make any investigation up at the county offices to see whether they had the deed recorded or mortgages recorded to verify their state-

(Testimony of W. L. Tobey.)

ments?

A. I did not.

Q. You knew what county the enterprise was in, didn't you?

A. Yes, sir, they told me what it was.

Q. Now, I wish you would explain to the court into the record here why it was that you neglected all of the ordinary investigations to verify the value of these bonds. You seem to have accepted them on their face value practically from DeLarm's statements.

A. Because in talking with DeLarm and with the other people that I met they impressed me as people that were square and honest and I had faith in what they were saying.

Q. Who do you mean by other people?

A. Why, DeLarm and Biehl.

Q. And you class Humphrey and Hodges in the same group?

A. Well, as far as Humphrey was concerned, he didn't—I had very little talk with him, only my first conversation. He just simply took me to Hodges. I had perhaps fifteen or twenty minutes or half an hour's talk with Humphrey. The balance of the deal was with the other men.

Q. Have you ever investigated the facts since whether or not at this particular moment these bonds were any good, the amount that were then outstanding?



(Testimony of W. L. Tobey)

A. I don't know that I understand that question, Mr. Wood.

Q. At the time you were over at Seattle, at the time you made your deal, if the total issue was limited to \$300,000. wasn't it good? Wasn't the enterprise good for that amount? And wasn't it the floating of millions of bonds that swamped the enterprise later on? Now, isn't that the fact?

A. I don't know whether they were good at that time or not. I was led to believe that they were good.

Q. And all your investigations led you to believe that they were good, didn't they?

A. At that time they did.

Q. And for some reason or other, you didn't go any further in your investigation. You didn't even write to the Northern Pacific?

A. No, sir.

Q. How long were you in Seattle?

A. I think I was there one day.

Q. Did you employ any attorney, or anybody to investigate for you?

A. No, I didn't employ any attorney at all.

Q. You went and saw one who refused to give you information unless he was employed?

A. I saw an attorney there, but I got no information whatever from him.

Q. I understand that you never delegated anybody to look up the question for you?

A. No, sir.

(Testimony of W. L. Tobey.)

Q. Either an attorney or anybody else?

A. No, sir.

Q. So that you came back from there satisfied; that is to say, you came back satisfied except on one point. Your inquiries had induced you from caution, to rate the bonds at only eighty per cent?

A. Yes, sir.

Q. And with that exception that you discounted them 20 per cent, you came back from Seattle satisfied?

A. Yes.

Q. Now, when was it that you had made this first contract for the sale of this land at \$120,000?

A. That was on the 25th day of February, 1911.

Q. 1911, 25th of February?

A. Yes, sir.

Q. And that was before you went to Seattle, was it?

A. Yes, that was before I went to Seattle.

Q. And when you came back from Seattle, you changed your mind on the value of the bonds?

A. Yes, sir.

Q. Where was this contract drawn up, this first one?

A. It was drawn up in Mr. Hodges' office.

Q. Portland?

A. Yes, sir.

Q. Who were present?

A. Mr. Hodges was there, and Mr. DeLarm. I

(Testimony of W. L. Tobey.)

think Mr. Humphrey was in the office; that is, out and in at different times; and my brother was there.

Q. Well, the Kilbournes weren't there, were they?

A. Well, I was just considering. This Mr. Edward Kilbourne was there.

Q. When the first contract was drawn?

A. Yes, sir.

Q. And then what was done with that contract? Each party take a copy?

A. Yes, I think so.

Q. Had E. C. Kilbourne and DeLarm examined that farm before that time?

A. Yes, sir.

Q. DeLarm wouldn't take it without an examination?

A. No, he wouldn't give any answer without an examination.

Q. Well now, when did you come to the conclusion that you would let DeLarm have it, provided DeLarm was willing to take it, and he said he had a friend over in Seattle he would want to examine it before he would take it, as he knew nothing about farm lands?

A. When did I decide to make the trade?

Q. As I understood your direct, you said you concluded you would make the deal, but DeLarm said he wouldn't bind himself until he had had it experted by a friend in Seattle.

(Testimony of W. L. Tobey)

A. Yes.

Q. Did any such conversation take place?

A. He wanted to see the property, and have his friend go with him to see it.

Q. Yes. Well, what was the sense of DeLarm and his friend going to see it, unless on your part you were willing to trade?

A. Well, I was willing to trade, provided I found what he told me was true; that is, I was satisfied with his bonds.

Q. Now, when did this conversation take place about getting a friend from Seattle?

A. It was when he decided to go up and look at the ranch.

Q. I am trying to get the date, as near as I can.

A. Well, it was just very shortly before the 24th of February.

Q. And he either sent for E. C. Kilbourne then at Seattle, or came over with him. Which was it?

A. Well, I am not sure as to that, but I think he sent for him.

Q. It is not material. I don't care. They two got together. How soon did they get together?

A. My memory was that Mr. Kilbourne was in Seattle, and he sent for him to come down.

Q. He came right over did he?

A. That is what I suppose.

Q. And you and your brother and DeLarm and E. C. Kilbourne went out to look at the land?



(Testimony of W. L. Tobey.)

A. No, sir.

Q. What are the facts?

A. My brother didn't go. Mr. Kilbourne and Mr. DeLarm and myself went.

Q. You said you *lefthere* on the night train.

A. We were in Arlington on the 24th day of February.

Q. 24th day of February?

A. Yes, sir.

Q. That is coming out?

A. Yes, sir.

Q. You spent one day at the ranch, looking it over?

A. Yes, sir.

Q. And when you were taking them back to the railroad at Arlington, you wanted to know what conclusion they came to.

A. Yes, sir.

Q. And what did Mr. DeLarm and Kilbourne say?

A. Mr. DeLarm and Mr. Kilbourne both said they were satisfied with the property. It was as represented.

Q. And was the agreement drawn then?

A. The agreement was drawn the next day, the 25th.

Q. You went right down with them?

A. Yes, sir.

Q. Went to Hodges' office the next day and had

(Testimony of W. L. Tobey)

the contract drawn?

A. Yes, sir.

Q. And then you went to Seattle to look at your end?

A. I did.

Q. About the bonds, and then you came back and raised the price \$20,000.

A. On my return from Seattle, I told my brother I wouldn't accept the proposition; that is, the \$120,000.

Q. Well, you told DeLarm that too, didn't you?

A. Yes, I told him that.

Q. Well, where was that conversation?

A. That I told DeLarm that?

Q. Yes.

A. In Seattle.

Q. Over in Seattle?

A. Yes, before leaving there, I told him that I wouldn't accept the \$120,000.

Q. Where was it you told him that?

A. It was in a restaurant where we took dinner.

Q. Who were present?

A. I think no one but Mr. DeLarm and myself at that time; possibly Mr. Biehl might have been present, but I think not. I think it was after Mr. Biehl had left us.

Q. And he accepted your decision did he, of \$140,000?

A. Not at that time, no.

(Testimony of W. L. Tobey.)

Q. What did he say?

A. He said that he would consider the matter, and if he decided to accept the proposition that I offered, he would come down to Portland.

Q. And how soon did he come down to Portland?

A. Well, within one or two or three days, I would say; very shortly after that.

Q. Did DeLarm make any counter proposition to you at that time, in the restaurant, or at Seattle at all?

A. I don't think he did. Of course, he hung out for the price of \$120,000.

Q. Well, as I understand it, at the meeting in Seattle, in the restaurant, your mind was made up that you would let the land go for \$140,000., and you so told him?

A. No, I didn't. I didn't tell him that there.

Q. Well, you state the facts.

A. We had been asking, or had asked \$25 an acre for the land, and I told him at our meeting in the restaurant, that I would accept \$35. per acre in the bonds; that is, provided my brother, after we got back here, was suited with it.

Q. And that is the proposition that he said if he concluded to accept it, he would come down?

A. Yes, he said he would consider, and he might come down and take the matter up further.

Q. What further did you hear from him?

A. Well, within a very few days he came down

(Testimony of W. L. Tobey.)

to Portland.

Q. Yes, but now, that proposition wasn't \$140,000, was it?

A. No, the \$140,000 wasn't mentioned in Seattle.

Q. Let's get at the real contract that was drawn. When did you agree, then, on that?

A. On the \$140,000?

Q. Yes.

A. At a meeting we held here in Portland after seeing him in Seattle.

Q. And that was the result of a compromise you made between \$120,000 and \$35 an acre?

A. Yes, sir.

Q. And when was that final contract drawn?

A. The final contract?

Q. The one that is in evidence here?

A. On the 4th day of March.

Q. Where?

A. Where was that drawn?

Q. Yes.

A. That was drawn in Mr. Hodge's office.

Q. And by whom?

A. I think that Mr. Humphrey— — —

Q. Drew that. Who was present?

A. Mr. Humphrey, and Mr. DeLarm and Mr. Hodges, my brother, and I think—well, they had the stenographer there, of course.

Q. Well, the Kilbournes weren't there that time, either of them, were they?



(Testimony of W. L. Tobey)

A. I couldn't state for sure whether the Kilbournes were there at that time or not.

Q. Now, when did this contract ripen into a deed? How long after that.

A. Well, it was made on the 15th day of March.

Q. So that would be ten days or so later?

A. Yes, sir.

Q. What was the cause of the delay?

A. I think in our contract for the sale of it, it was stated that they were to give a certain length of time in which to prepare the abstracts.

Q. You prepared the abstract?

A. Yes, sir.

Q. To whom did you deliver it?

A. The abstracts were—I think the abstracts were delivered to Mr. Kilbourne.

Q. You didn't have an abstract ready with Mr. Sherlock?

A. No, not with Mr. Sherlock.

Q. You had to have it prepared?

A. We had an abstract, but we didn't have it brought up to date.

Q. And you had it brought down to date, and where was Mr. Kilbourne when it was delivered to him?

A. I think in Mr. Hodges' office.

Q. And how long after the signing of the contract of March 4th, would you think that was? How long before the delivery of the deeds?

(Testimony of W. L. Tobey.)

A. I think the abstracts were placed with the abstracter for completing immediately after the contract was signed.

Q. And how long before you got them and delivered them to Mr. Kilbourne—got the completed abstracts?

A. That is so that Mr. Kilbourne was satisfied with the abstracts?

Q. How long after the contract was signed, did you give Mr. Kilbourne abstracts for him to examine?

A. Oh, I can't tell the exact date.

Q. You are sure you gave them to Mr. Kilbourne, are you?

A. I am satisfied either Mr. Kilbourne, or in his presence in the office there.

Q. I am talking about the abstracts?

A. Yes, sir.

Q. How long before the deed was signed?

A. I can't give such dates as that. That would be hard to remember, just the dates.

Q. I know, but how long—you signed the deed March 15th, didn't you?

A. Yes, sir.

Q. How long before that did you deliver the abstract?

A. Well, I think as soon as the contract was drawn for the sale of the property. The abstracts then were sent to the abstract office.

(Testimony of W. L. Tobey.)

Q. That didn't help the buyer any. That didn't help DeLarm or Kilbourne, when you sent to the abstract office. I am trying to find out when they came back from the abstract office, when they were given to DeLarm, Kilbourne, or anybody that represented the buyers.

A. I cannot give exact dates.

Q. I don't want exact dates; as near as you can fix it before the deed was executed, how long a time did they have the abstracts in their hands?

A. I would say it was about the time the deeds were made.

Q. Now, who delivered these abstracts from the abstract office? Were they delivered by the abstracter to DeLarm or Kilbourne, or somebody representing them, or were they delivered to you?

A. No, I can't tell that whether they were delivered to me, or whether they were delivered to Mr. Kilbourne.

Q. Do you remember delivering them yourself to anybody?

A. I remember of handling them at different times, having them.

Q. The complete abstract, the finished abstract brought up to date, you had them in your possession?

A. At different times, I had them, yes, because we went to the man who examined the abstract here in the city;—abstracts were gone over at that time.

(Testimony of W. L. Tobey)

Q. Now, Mr. Tobey, I want to call your attention to your direct examination, in which you said that when DeLarm said to have the deed made out to Kilbourne, at the time it was delivered there, Kilbourne being present, that was the first inkling you had that Kilbourne had any interest in the transaction.

A. When the abstracts were—when the deeds were being drawn, or getting ready to prepare the deeds for drawing was the first we knew then that Mr. Kilbourne was interested in it, yes.

Q. If you had been delivering abstracts to him before that, wouldn't you have known he had an interest in it?

A. I say, I don't know that we delivered the abstracts to Mr. Kilbourne, I don't know— — —

Q. You said just now you delivered them, either to Kilbourne or to DeLarm; you didn't know which one of them.

A. Well, I do say so.

Q. But you ought to know you didn't deliver to Kilbourne, if it be true that the first idea you had he had any concern in the matter, was the day you were drawing the deed.

A. Well, but the abstracts weren't received back from the abstracter's office as soon as the contract was drawn.

Q. I am talking about the delivery of the deed. Weren't the abstracts received back before the deed

(Testimony of W. L. Tobey.)

was drawn?

A. I don't think it was. Were perhaps about that time.

Q. Now, let me refresh your memory. I think you are getting nearer to it. Mr. Kilbourne never saw these abstracts until DeLarm informed you people that he was to take the deed, and at the same time, with the deed, Kilbourne for the first time in his life got the abstract, and wasn't all that delay after that caused because they couldn't get their loan from Balfour Guthrie until they had passed on the abstract and were satisfied with the title? Isn't that so?

A. I suppose they couldn't get their loan until the abstracts were completed and found correct by the loan company.

Q. Doesn't that refresh your mind, and isn't it true that Kilbounre got the deed and the abstract at the same time?

A. Well, I haven't said that he didn't get them at the same time.

Q. Now, Mr. Tobey, you said that Hodges was always talking about some securities that he had in a tin box at the hotel, actual securities, that he always put you off. Does that state what you said? Do you remember that?

A. That is the substance of it, yes.

Q. Didn't that make you suspicious of Hodges; that a man had a tin box full of mortgages and se-



(Testimony of W. L. Tobey.)

curities as collateral and put you off with excuses all the time?

A. I never really demanded to see the securities more than at different times he had contracts there, and would show them to me.

Q. You said in your direct that he always kept putting you off with some excuse or other, as if you were asking?

A. Yes, whenever anything was said about securities, he said he didn't have them in his office, because he had no safe or deposit box there, and he kept them in the deposit box which I believe was in the hotel.

At the time the deeds were executed Mr. Hodges, Mr. DeLarm and Mr. Kilbourne and, I think, Mr. Brazell, if I remember right, were there and the parties to the deeds. It was done in Mr. Hodges' office in the Chamber of Commerce Building. He had three rooms and I think we were in the room occupied by Mr. Hodges when the deeds were signed. I would not be sure as to the exact room. When the deeds were being prepared, I think his attorney prepared the deeds, this man Brazell, that is my recollection now—and he instructed him to draw them to Mr. Kilbourne, and told us that he had disposed of the lands to Mr. Kilbourne. That was the day the deeds bear date, March 15th. That was the first indication we had Kilbourne was in it.

Q. Now, I wish you would think a little bit and

(Testimony of W. L. Tobey)

see whether it isn't so, that when you went to finish up this business, receive the bonds and deliver the deeds, that you and DeLarm and the others were in Hodges' inside room, and Mr. Kilbourne remained in an outer room. He was not in the same room, and in the immediate group when you closed this transaction?

A. When the deeds were executed?

Q. Yes, and you got your bonds.

A. No, I couldn't say as to that positive, but very—they were all in and out of the office.

Q. As a matter of fact, though, you didn't take these bonds without counting them, did you?

A. They were counted over there, yes, sir.

Q. And don't you remember that you retired to a private room to count the bonds?

A. No, I do not.

Q. Did you count them in the presence of anybody?

A. I think we did.

We went to Mr. Chamberlain's office because that was the attorney that was being employed, I supposed, to examine the bonds for the loans which were being made, the loan that Mr. Kilbourne got, the \$20,000 loan from the Balfour Guthrie Company. I didn't have anything to do with that more than to go and see what objections Mr. Chamberlain made to the title. The deeds and bonds were placed in escrow, my memory is, because of the corrections that

(Testimony of W. L. Tobey.)

were to be made on the abstracts and the title demanded by Balfour Guthrie. Mr. Kilbourne had nothing to do with the deposit of \$6000 bonds with a note for \$3000. We put up \$6000 of the bonds as security for the \$3000 note. Kilbournes really had nothing to do with that as far as I know. It was really a matter between DeLarm and us. While the notes were made payable to the Trust Company, yet all of our talk and arrangements for the loan were with DeLarm. The note was signed by F. L. Tobey and W. L. Tobey. We were borrowing the money for ourselves. It was made a part of the contract in selling the land that we were to have this loan and DeLarm promised it to us. My brother and I put up the \$6000 bonds. They were some of the bonds we got from the company for our property.

As I remember Brazell, I think was one of the officers of the Trust Company, or one of the organizers, or had something to do with the Trust Company, as I learned afterwards. That is my impression now. He was an attorney and I think attended to their legal work. In my testimony when I have talked about Mr. Kilbourne in this examination, I refer to E. C. Kilbourne.

I hadn't seen C. A. Kilbourne at the time we made the contract for the sale of the property. I hadn't seen him until after the deed was delivered. I saw him about that time. I think I saw him one time when we were at Mr. Chamberlain's office ex-

(Testimony of W. L. Tobey)

amining the abstracts, when he was trying to get the money from Balfour Guthrie, during that period.

Q. When you were over in Seattle, you didn't look up E. C. Kilbourne, did you?

A. I didn't know that there was such a man.

Q. Why, you didn't go to Seattle until after they had been up on your ranch, did you?

A. No, not until after they had been to the ranch.

Q. Maybe I made a slip of the tongue. You had seen E. C. Kilbourne on the ranch. He was there with DeLarm.

A. Oh, yes, Edward C. Kilbourne—yes, I had seen him on the ranch.

Q. Then you saw him, and you now say in your pleading that you thought that he was a partner of DeLarm, associated with him.

A. At that time?

Q. Yes.

A. No, at that time, DeLarm, when he spoke of having another man go along, he represented that he was just simply a friend of his, an acquaintance that he wanted to go along and give his judgment on the place; that he was better acquainted with farm lands and farm values than he was.

Q. You knew that E. C. Kilbourne was that man when he came on the ranch?

A. Oh, yes; yes. When we made the trip to the

(Testimony of W. L. Tobey.)

ranch I knew that was the man, of course.

Q. And do you know whether anything was said about E. C.'s being DeLarm's engineer or irrigation expert?

A. Not at that time.

Q. When was that mentioned?

A. That wasn't mentioned at all. The first that I remember knowing of that, was about the time that the deeds were passed.

Q. As a matter of fact, when they went over the ranch, E. C. Kilbourne did talk to you, and questioned you about the *x* capability of its being irrigated, and so on?

A. I think that there was talk of irrigation at that time.

Q. By a pumping proposition?

A. I think so; or irrigation in some way.

Q. Now, then, to get back to the question you misunderstood. You had met Mr. E. C., Edward Kilbourne, up on the ranch, and you knew he lived in Seattle. When you went over there. did you call on him?

A. No, sir.

Q. Did you know that Edward Kilbourne was the engineer for the pumping plant at Wahluke engineer for that irrigation project?

A. At the time I went to Seattle?

Q. Yes.

A. No, I did not.



(Testimony of W. L. Tobey.)

Q. Did you know at any time, and if so, when did you learn it?

A. Why, I think it was about the time that the deeds were passed, when we found that he was to be the owner of the place, that he was even connected with the company, in constructing the pumping plant.

The witness being asked if he knew anything about the deal by which DeLarm put water on the land and took half the land in payment said.

Mr. DeLarm had explained to us that the people who owned the land there—that they (DeLarm) would put the water on for half of their land. If they had 160 acres of land, by deeding half of that, 80 acres, to the company, they would put the water on the land, or they would charge them \$100 per acre for putting the water on.

I don't know that I knew anything about water mortgages. These bonds here are not all the identical bonds received on the trade of the 15th of March, 1911. There were a part of them exchanged for smaller denominations and the ones we received in exchange were of the first of June issue. I think it was about \$60,000 worth. We never sold any of our bonds. We made an effort to exchange and sell at different times, from the time we first got them and we never got any more of them in any trade. There were different propositions put up to us, yet we never made any trade.

(Testimony of W. L. Tobey)

I made one trade for my sister in law, about \$4200 in bonds and traded a piece of real estate for them. I do not remember the date. It was some time during the fall of 1911. The real estate was situated in Portland. The property belonged to my brother's wife and it was deeded to a man by the name of C. C. Randall.

We wanted to get these convenient small denominations to facilitate trading in these bonds, or trading or selling. That was some time during the summer of 1911.

Mr. DeLarm said that he had a place for this property and if he didn't, he wouldn't touch it. He did not indicate what disposition he intended to make of it, at the time we first spoke of that, and did not until the time when we found it was going to Mr. Kilbourne. He said then that he was turning it to Mr. Kilbourne in payment for installing the pumping plant. I asked the question, in a conversation we had. He said that he was selling these bonds for the purpose of raising money to carry on this project. I asked him how he could use the land—that he couldn't pay bills very well with that, and he said then that he had a place for the ranch and that he knew right where it was going.

Q. Did you ever recommend the purchase of these bonds to anybody?

A. We had a good many inquiries regarding them and sometimes I would tell them that I would

(Testimony of W. L. Tobey)

rather they would investigate for themselves, but that we had traded for them.

Olex and up around that part of Gilliam County belongs in the semi-arid section of Eastern Oregon. It is a light dry soil and depends to some extent on the rainfall, taking the country as a whole. It depends to some extent upon the snowfall and rainfall. Of course, if they get no rain, there would be no crop. That country as a whole depends upon precipitation, rain and snow for a crop.

Q. Now, didn't you have a series of discouraging years in 1908, 1909 and 1910, along there? Three bad dry years?

A. There were a few years there when the conditions weren't of the best.

Q. I would like a little more specific answer than that, if you feel you can give it. 1908, '09 and '10 have passed into history, haven't they, as three bad years right in succession?

A. No, I can't say that they were.

Q. That is not your recollection?

A. No, sir.

Q. You weren't desirous of getting rid of that land because it was too awful uncertain farming in that dry district?

A. Not necessarily so. We didn't care to live there regular, and we considered we rather have our property in some other place unless we wanted to live there, and look after it personally.

(Testimony of W. L. Tobey.)

Q. Wasn't there lots of land for sale cheap, and weren't people anxious to get rid of their land up there in the spring of 1911?

A. As to the cheap part, I can't say, but I will say that ever since I have been in the country, nearly every place in Oregon you are minded to go, most everything is for sale.

Olex is in a direct line, perhaps 18 miles from the Columbia River. The further back from the river, the more precipitation you get, to the mountains, and, of course, in the mountains you get more than the lower lands. The mountains are about 60 miles back.

Cross Examination.

(By Mr. FLEGLER.)

When possession of the land was given, it was given to Mr. Kilbourne; as far as I know he has been in possession of it ever since. The deeds were all recorded and were in the name of Mr. Kilbourne to all of this property. The first time we learned of this fraud was at the time they went into the hands of a receiver—into bankruptcy—during the latter part of January, 1912, just shortly before the interest period. I placed the matter in the hands of my attorney. I can't state the exact time but somewhere two to four months, I would say, after that time. Did not immediately place any notice on the records of the fact that we had been defrauded. I employed an attorney and just what time he served



(Testimony of W. L. Tobey.)

notice I can't say. I can't say just what time the suit was brought or what time the first notice was given.

I had a communication from someone in Seattle, asking for a valuation of the land.

I remember of having a telegram or phone communication, but whom it was sent to I don't remember.

Defendant's exhibit D introduced.

A total failure of a crop would represent a loss of five or six thousand dollars a year. There have been years when the crops were poor. Some years there would be rather a short crop and most years have been good. We could raise sometimes a 15 bushel crop, sometimes a 20 bushel crop and sometimes a 25 bushel crop. 'If it fell below 10 bushels it was rather a poor crop. We did not often get a poor crop. We had some short crops. There was one year while it was rented it was below 10 bushels.

The price of wheat varies from 70 to 75 cents, sometimes even higher than 80 cents, and in addition to plowing and seeding we had to haul the wheat to market; you would have to have it threshed, harvested, etc. There wouldn't be much left if we got below 10 bushels to the acre. I don't remember how much we realized out of the place the last two or three years. We kept no book account of it, so that I could not give the figures, even a rough estimate, not anything at all accurate. Now at the time I knew it,



(Testimony of W. L. Tobey.)

but I don't now.

Q. And you have that land under all these conditions for sale, but were not able to sell it on a straight sale, but concluded that you would trade it.

A. We did not sell it, we had made efforts to sell or trade it.

Q. But finally concluded that the best trade that you could make was these bonds?

A. That was, yes, we were satisfied to take the bond trade at that time.

One tract something like two thousand acres we bought in one body. I cannot give the date of that, it was perhaps the year 1903 or 1904. We paid between \$10 and \$11.00 an acre for it. We bought it on a straight purchase.

Q. Has the country settled up there since you bought the land?

A. Why, there has been some new land plowed since that time. No, you can't say that it really has settled up, because at that time practically everything that was suitable for cultivation was being cultivated in that vicinity.

Q. No more population there than when you bought it?

A. No I don't think so.

Q. And it was generally unsettled?

A. Just about the same conditions as it is now. The time we bought it the crops were about an aver-

(Testimony of W. L. Tobey.)

age for the time that it had been farmed.

Q. What is it that has ever happened to it that would make it worth \$20 to \$25 an acre now?

A. Simply because of the increase of the population throughout the west, the people who have been coming here and farm values, the value of all property has greatly increased for a good many years throughout all Oregon.

Q. Not on account of the productiveness of the lands, nor the increase of the population, particularly in that locality?

A. No.

The population there hasn't increased for a great many years.

Q. Now, Mr. Tobey, let me use a homely and forcible expression and say whether you don't think a great many people in their experience there would consider that a God forsaken country?

A. We can always find people in any place that are dissatisfied with the country in which they are living, that is no exception to the rule in that.

Q. But a great many people *fell* just about as I expressed it, isn't that the case?

A. Why, possibly that is the case but that will apply to any place that you go.

I didn't know what Mr. Wakefield wanted in enquiring about the land, but that I don't know as he did. My impression is that I talked with Mr. DeLarm over the phone, and I didn't know that he

(Testimony of W. L. Tobey)

wanted to place a loan on it. I knew that the place never went into DeLarm's hands, that is in his name.

I knew that it was at Mr. DeLarm's request to put a valuation on it. It is possible that the telegram may have been sent to Mr. Wakefield, but it is my impression that it was all with Mr. DeLarm.

Mr. Wood produced a copy of the agreement of February 25th, 1911, between the plaintiffs and DeLarm.

Witness testified that that agreement was actually signed.

Witness being asked to fix the day of the week when he went over to the ranch with Mr. Kilbourne and Mr. DeLarm, stated, I can fix the day of the month, it was on the 24th day of February.

Witness testified that to the best of his recollection Mr. Kilbourne, was present when the agreement of February 25 was signed, but stated that there was no particular circumstance to fix Kilbourne's presence in his memory, that Kilbourne, had no word, or voice, or took any hand in it.

Copy of agreement introduced in evidence marked Defendant's Exhibit "E".

Redirect Examination.

(By Mr. WILLIAMS.)

Witness testified that at the time Mr. Kilbourne and Mr. DeLarm went to the ranch with him that Frank had gone on ahead, and was there at the ranch when we got there.

(Testimony of W. L. Tobey.)

My purpose in exchanging the bonds of larger denomination for smaller ones was because we *though* we could dispose of them, either sales or trades to better advantage having smaller denominations. We had some prospective sales or trades where they stated they couldn't use the larger denominations. We never offered to sell or trade them for anything less than par.

My attention was called to the securities back of the bonds and the guarantee of the bonds by the Washington Orchard, Irrigation and Fruit Company, but I don't know that the trust agreement was called to my attention. Sometime afterwards we talked to Mr. Hodges about the trust agreement, but not at the time of trading. We asked to see the trust agreement and he stated that he did not have it, but that it was on file, I think, with the Secretary of State of Oregon, and I wrote them and found that it wasn't. That was after we closed our trade, during the summer sometime, then I wrote to the County seat of Grant County, where these lands were located to know whether it was recorded there and they stated no that it wasn't. This was sometime after we had traded.

The reasons why Mr. Chandler, gave up his lease to the premises up there, in the first place, he was a boozier and a drinking man, and very unreliable and his expenses for operating were more than they should be and he had no money to operate it with,



(Testimony of W. L. Tobey)

was owing Mr. Wade, very heavily and I suppose probably couldn't pay his bills all up, and I suppose he decided he wanted to get out of it and turned the lease over to Mr. Wade. Mr. Wade's reasons for surrendering the lease was that he had a store there and he has to personally take charge of that; he also owns one or two ranches, did at that time, quite a large ranch he had to take charge of this personally, and he also had ranches under his control that he had mortgages on, both chattel mortgages and crop mortgages, and he had to take lots of his time to look after that, and he just had more than he could do to look after everything and he wanted to get out of it. There was one year that Mr. Wade, had it when the crop was poor, my impression is that it was the first year, 1909, the other year was good.

We received enough from the proceeds of the ranch to support the two families. We had some indebtedness and paid it out of the proceeds of the ranch. The purchase price of the 2400 acre tract, which was purchased about 1901 or 1902 was \$25,000.00, for the land alone. We made a small payment in cash and the remainder was paid up in crop payments each year until the land was paid for. We gave half the crop each year or the proceeds of the sale of half of the crop and paid interest at 8 per cent. on the unpaid part. We were about six years in paying this up. We paid this all up from the grain raised on this particular piece of land. We



(Testimony of W. L. Tobey.)

bought some of the land from the school land, this was some of the pasture land that we bought with script, two pieces and we paid somewhere from six to eight dollars an acre. I don't remember how much there was in this. At the time, we bought this land wheat ran around the 50-cent mark and it was gradually increased in value up to 70, 75 or 80 cents and even higher than that since. It has gradually increased during this term of years so that wheat was worth much more when we sold this ranch than it was at the time we bought it. I think the first crop that we raised we sold for 59 cents. It hasn't been down that low in the last four or five years.

The method of cultivation has nearly all to do with the amount of crop raised. It is necessary to farm this land in a manner to conserve the moisture. We do that by cultivation after plowing to prevent evaporation. We do this by using harrows or tools to loosen the surface of the ground for a very shallow depth. This method of cultivation was a matter of development. It wasn't largely practiced at the time we started farming as it has been in later years. The land at the time we turned it over to Mr. Kilbourne, was in very good state of cultivation. It was in much better condition than when we first got it, and the improvement and the cultivation of the land would have the values. We put up machine sheds and granary and put down a well or rather a reservoir for domestic use.

The coupons are not on these bonds now. They

(Testimony of W. L. Tobey.)

were cut off at the time of the interest period intending to send them here to Portland, to the bank to collect the interest. We had the bonds with us where we are now living at Merlin.

I have made *a* effort to ascertain the date of the paper that the collapse of this scheme first came out in. The date was on the 1st day of February, where a receiver had been appointed in Seattle. I had these coupons ready to send to Portland, at that time, I had them already, a letter written already to mail to the bank here for the collection of the interest when this came out in the paper, and I held them. I turned them over to Mr. Woodcock with the bonds. I never received *on* cent on these coupons, and have never negotiated a sale of them.

At the time I sent that telegram to Seattle, I did not know the purpose for which they wanted valuations up there. I did not know what the purpose was. We spoke of it at the time, wondering what they wanted that information for. We had negotiations with DeLarm, about trading these bonds for lands within the Wahluke project after our deal. They had told us that we could trade the bonds of course, for any property which they had, either property in the project or any other place. We decided that if we could exchange these bonds for this land at Wahluke developed, that is as an alfalfa proposition that we would take it in that way and we went to them and made them a proposition or

(Testimony of W. L. Tobey.)

asked them if they would consider developing sufficient land and at what price to take up the bonds, and we made an effort to do that with them.

Q. When you entered into the contract, the 4th of March, 1911, with DeLarm, was there more than one copy of that contract made, was the contract made in duplicate?

A. I don't know for sure whether it was or not.

Q. Did DeLarm have a copy of it?

A. Continued, but it is my memory that it was, I wouldn't be positive about that.

Q. At the time you turned over the deed for the land were any contracts surrendered to you for cancellation by DeLarm, was the contract surrendered to you for cancellation.

A. I think not.

Recross Examination.

(By Mr. WOOD.)

There was about two years while we were living at Olex, that we were not in the merchandise business, we had sold that. For a part of the time when we first bought the ranch I took charge of the store and my brother was on the ranch, until we sold the store. We sold it to a man named Lawrence. We never resumed merchandising at Olex. We moved out on the ranch for a short time, a part of one year perhaps, I don't remember the exact length of time, and then moved back into Olex again. We were in Olex ten years. Between six and seven of

(Testimony of W. L. Tobey.)

these we were in the store and the balance of the time lived there and took charge of the ranch. We leased the ranch at the time we came to Portland. We had charge of the ranch up to the time of leasing and when we had leased it, then we came to Portland to live. We operated the ranch ourselves, I think, for about eight years, if I remember. My brother and I were always partners and we kept no books showing income and outgo, we kept books in the merchandising business, but didn't keep them for the ranch because we did not think it was necessary. We didn't go to that trouble to keep a set of books for the ranch.

Mr. Chandler, had practically the 4000 acres when he was operating the ranch. When we were operating the ranch ourselves, almost every bill was paid by checks and in that way we could know about what the operating expenses were, that you may say was the only books we had to determine anything about the expenses. We figured that the expenses of operation would be somewhere about seven thousand dollars for the ranch. About half of it was in cultivation in each year. There was about 4000 acres of farm land and we farmed half a summer, fallowed the other half. We followed the Campbell system of dry farming to some extent, not in full.

The number of times that we harrowed for mulching depended largely on the conditions. If a year with lots of moisture after plowing so the weeds



(Testimony of W. L. Tobey.)

started would require lots of harrowing to keep the weeds down. Sometimes the ground would be gone over six or seven, or eight times, on an average it wouldn't be that many times. There might be some pieces, some years, perhaps, when we would do this. The dry farming system is expensive. It would be more expensive, of course, than it would be where they simply plowed and let it go without any more cultivation. The farmers had a good fair crop in the year 1907. I don't know whether it was a phenomenal crop or not, I know that we had a fair crop that year. It is possible there may have been one year that would be a little better than the average year, but we did not have three bad years. We have no record of the exact yield for any year, as we kept no books.

Of course, the more we raised the more dollars we had. I couldn't be positive, and I couldn't give the exact yield on the last year that we had it, my memory would be that it would be somewhere between fifteen and twenty for the year 1907. The last year before we sold it as I remember it, that was a very fair yield. Now as I stated before there was one bad year that Mr. Wade had it, and I am not positive whether it was the first year or the second year, but to my memory is, the first year that he had it was bad, the next year was fairly good. For the bad year the yield was very small. I can't give you that at all. I would not have any idea what it was. I



(Testimony of W. L. Tobey.)

know it was very small. I couldn't say positively that Mr. Wade lost money, the two years he operated the ranch, because I do not know what his operating expenses were. I do not know what the yield per acre was.

The last year we had it, it is in a general way remembering it, my memory would be that it was somewhere in the neighborhood of fifteen or twenty bushels per acre. Yet I would not be positive as to that, and I do not remember the prices per year.

We were shown the bonds when we first started negotiations with DeLarm for the trade of the place. I had them in my hands. I cannot say that I read them all through or not. I presume I did, although I do not know. I do not know that I noticed on the face of the bonds an allusion to the trusteeship, or the deed of trust. Mr. Hodges, told me that the trust agreement was recorded with the Secretary of State and I found out it wasn't. Afterward he told me the securities were locked up at the hotel, but this was after we had traded.

Q. Well, you had seen enough of Mr. Hodges, according to your statement to know that he was deceiving you and lying about that particular fact? Did you then start a line of investigation to see where this trusteeship did lie?

A. I made an effort to find it, yes.

Q. What did you do?

A. At last they produced it in the office and I

(Testimony of W. L. Tobey)

saw the trust agreement there.

It was the office of Mr. Hodges', that was after the deal had been made.

COURT: During the time you were investigating these bonds between the date of the first statement, and the agreement of March 4th, did you see the records of either of these corporations?

A. That is the records regarding their securities, etc?

COURT: No, no, the records; the books of the corporation.

A. Oh, no, I did not.

COURT: Did you ask to see them?

A. No, sir.

COURT: Did you make any inquiries as to who the incorporators were, or the amount of the stock?

A. No, I don't think that I did.

COURT: You didn't ask to see the records of the bonds, to see how many bonds had been issued?

A. No.

Q. Mr. Tobey, you stated on your cross examination, in answer to certain questions of mine, that you asked Mr. DeLarm how on earth he was going to use the land to get money, and he said he had a place for it, etc. You knew that he was hard up for ready cash at that time, didn't you?

A. No, I didn't know anything about it, whether he was or not.

Q. Didn't you testify that you said to DeLarm

(Testimony of W. L. Tobey)

“How are you going to pay your debts with land?”  
And he said he had a place to put it?

A. Yes, sir, he did.

Q. Then you knew he had debts, and was skirmishing around to get your land to help pay them?

A. He told me he was disposing of bonds to raise money to finance this proposition.

Q. Then do you remember a \$500 check of DeLarm's that was returned for lack of funds?

A. Yes, sir.

Q. Yes, when was that?

A. That was when we were getting the second loan for \$3,000.

Q. That was the loan that was to come to you?

A. Yes, sir.

Q. That showed you that he was hard up, didn't it?

A. It did, right at that time, yes.

MR. WOODCOCK: That was after the transaction, though, after you had made the deal.

A. That was after we had made the deal.

Redirect Examination.

(Questions by Mr. WILLIAMS.)

One question I would like to ask. It should have been asked on direct, but was overlooked. Mr. Tobey, when Mr. Kilbourne and yourself and Mr. DeLarm, was upon the ranch, was anything said there about selection of the stock which was to remain there?

(Testimony of W. L. Tobey)

A. Yes, there was.

Q. What was said about that?

A. Well, the stock was looked over, and of course there is always a choice; there is some better animals than others, and he spoke about wanting to select the stock. They wanted to select the stock, and we told him no, we would select that ourselves.

The farms up on Gilliam County, run from 160 acres up to six or eight thousand acres, generally large.

#### Recross Examination.

Mr. DeLarm told me that the Kilbournes were taking over this land in payment of work in creating the power plant, that he was paying for the power plant in doing this.

#### [Testimony of G. H. Plummer, for the Plaintiff]

G. H. PLUMMER, being called as a witness on behalf of plaintiff, testified:

(Questions by Mr. WILLIAMS.)

I reside in Tacoma, Washington; have resided there for twenty-four years. My age is 45, and I am Western Land Agent of the Northern Pacific Railway Company, and I am familiar with the irrigation scheme at Wahluke, promoted by the Columbia River Orchard Company. I was acquainted with W. E. DeLarm, and slightly with A. J. Biehl. I was up over the project once and spent the greater part of one day there.



(Testimony of G. H. Plummer.)

I am familiar with the lands owned by the Northern Pacific Railway Company there. The company originally owned one half of the whole area under the project. They sold to the Columbia River Water Company, a power house site on the bank of the Columbia River, and also the right of way for the canals that they had constructed. Other than that we own all of the lands in the odd sections constituting approximately half of the total acreage under the project.

In February, 1908, we received an application from G. W. Armstrong, who represented himself as the manager of the Columbia River Orchards Company, for the purchase of three sections, sections 9, 11 and 15 in Township 14—26 East, which sections are part of the land underlying the project and immediately surrounding Wahluke, the townsite. The application was denied. I told Mr. Armstrong that the lands were not for sale.

There were from time to time a number of applications made on behalf of the company that DeLarm and Humphreys represented, but up to the latter part of 1911, we always declined to sell the lands. The reason was that these lands formed a part of a larger irrigation project known as the Priest Rapids Irrigation scheme, which contemplated the irrigation of between fifty and sixty thousand acres of land and we had reserved all of our lands under the project, which consisted of about half of the total acreage for a number of years hoping that



(Testimony of G. H. Plummer.)

at sometime, in the future, we would find somebody who would be able to finance and carry out the larger project, which of course, meant a great deal more to us as a transportation company than the irrigation of a small area. Our reason for refusing the sale of these particular lands under the Wahluke project was that they formed some of the best land and the more easily irrigated, I say most easily irrigated, meaning most cheaply irrigated, and we felt that if we should sell any part of the lands on the lower flat where this Wahluke lands are that it might delay the construction of the larger scheme, therefore we declined to sell them, and so informed Mr. Humphreys. His application was made in July 1909.

The next application was made in June 1910, by E. C. Kilbourne. Mr. Kilbourne was representing at that time the Columbia River Orchards Company. I had a personal interview with Mr. Kilbourne, about the matter on June 9, 1910. I told Mr. Kilbourne, that the lands were not for sale, and also followed that up by a letter written the same day after my interview with him, in which I stated that none of our lands in that vicinity is for sale at the present time. All our holdings are being reserved under instructions from the land commissioner Thomas Cooper, of the Northern Pacific Railway Company at St. Paul.

At that same interview I had a conversation with

(Testimony of G. H. Plummer.)

Mr. E. C. Kilbourne in regard to the sale of the right of way for the ditch and power house. Mr. Kilbourne explained to me the physical condition pertaining to the construction of the canal and the pump house and what it was designed to do, and I told Mr. Kilbourne, that an application, which had been previously made to us by Mr. DeLarm, for the purchase of the right of way and the pump house site, had already been submitted to our Land Commissioner, and that as soon as the Land Commissioner came west, which he contemplated doing in a few weeks that I would discuss the matter with him and would then advise the Company whether or not we would sell the right of way and the power house site. At that time we had made no agreement with them to sell the power house site or the right of way for the canal.

On August 2, 1910, I wrote a letter to the Columbia River Orchards Company, offering to sell the pump house site and right of way at \$50. per acre and requesting them to limit the width of the right of way to an amount that was sufficient to maintain the canal which I suggested should be 50 feet wide and I told them that as soon as they had prepared a description and figured out the acreage that we would be prepared to close the sale. The sale was finally closed on September 22, 1911. After they had advised me, thru Edgar J. Wright, of the exact area of the right of way, which was 57.88 acres and

(Testimony of G. H. Plummer.)

upon payment of the balance of the consideration. Mr. Wright had paid in June, \$2700.00 towards the right of way, which was merely a first payment, because they hadn't yet determined what the acreage was, so we couldn't figure up what the consideration would be. That was June of 1911. That money was held until September of the same year, when they gave us the acreage and paid the balance of the consideration \$194.00. We then prepared a deed running to the Columbia River Water Company, which was made to that company at the request of Mr. Wright, That deed was sent to St. Paul, for execution and was delivered to Mr. Wright, on November 1, 1911.

Witness produced a copy of that deed, which was admitted in evidence, Plaintiff's Exhibit 4, subject to objection as being immaterial and irrelevant.

In October of 1911, A. J. Biehl, called at my office and made an application for the purchase of the land belonging to the Northern Pacific Railway Company, within the project, and he also was told that they were not for sale.

I do, not recall the conversation I had with Mr. Kilbourne, excepting so far as it might be recalled by a letter that I wrote him following my talk with him, which is the letter I referred to before of June 9, 1910, in which I said that none of the lands of the company in that vicinity were for sale.

Q. Now, did Mr. Kilbourne, call at the office

(Testimony of G. H. Plummer.)

there in Tacoma, in regard to the purchase of the right of way and site for the pumping plant.

A. He spoke about that at the same time, on that same day June 9, 1910, and in this letter that I have just referred to I told him that I had submitted the matter of the sale of the right of way to our land commissioner with a recommendation that it be sold. On July 1st, 1910, Mr. Kilbourne wrote me a letter. The letter was read into the records as follows: "July 1, 1910.

Northern Pacific Land Company,  
Tacoma, Washington.

Attention of Mr. Plummer.

Dear Sir:

The Columbia River Orchards Company is anxious to arrange for the right of way for the canal for their irrigation plant at Wahluke. You stated that the matter would be taken up on the arrival of Mr. Cooper whom you expected about the 25th of June. We write to remind you of the matter as we presume you have a multitude of affairs to take up with him and this one might be overlooked. If you will be so kind as to notify us when you will have time to see us, we will come over.

Very truly yours,  
Kilbourne and Clarke Company,  
Engineers for Columbia River  
Orchards Company,  
By E. C. Kilbourne, Manager."



(Testimony of G. H. Plummer.)

On July 11, 1910, I addressed a letter to the Columbia River Orchards Company at St. Paul in reference to the right of way for the canal across our land, and in that letter I suggested that another company, the Columbia Valley Reclamation Company, in which Mr. Strahorn and Henry J. Pierce of Spokane were interested, were figuring on building the larger project that I referred to at the beginning of my testimony, and that it might be possible that the Columbia River Orchards Company could make some arrangements with the Columbia Valley Reclamation Company to procure water from their system, thus avoiding the construction of an independent plant to irrigate the small block of lands around Wahluke. I had, however, in the meantime received authority from our Land Commissioner to sell the right of way and pump house site, and after some correspondence between the Columbia Valley Reclamation Company and Columbia River Orchards Company it was determined that the Reclamation Company's project would not be constructed and therefore the Columbia River Orchards Company would not be able to get water from that larger system. That being determined I wrote the Columbia River Orchards Company on August 2, 1910, quoting them a price of \$50 per acre for the right of way and the pump house site.

Late in 1911, the matter of selling our lands in the project was taken up at the request of R. S.



(Testimony of G. H. Plummer.)

Chapman, of Chicago, who had made some investigation of the Columbia River Orchards Company's project and had concluded that if our lands could be acquired he would undertake to finance it with a view of putting the Company in good shape and completing the canal, paying up the debts, and starting it off as a live concern. These negotiations started October 13, 1911. Mr. Chapman called on me with a letter from our Land Commissioner, and I discussed the matter with him pretty fully and agreed to go with him to look over the project on the ground, and on October 19, 1911, Mr. Chapman and Mr. DeLarm, and Mr. DeLarm's superintendent of canals and myself went over the project. I made a report to our Land Commissioners, advising him that the canals had already been constructed, a pump house had been built and machinery partly installed; that about \$200,000 had been spent and that in view of the fact that that investment had been made and the canal practically completed, I recommended that we sell the lands owned by our company below the constructed project, and in addition to that that we sell the lands above the constructed project but below a contemplated project upon condition that they construct the canal for irrigating the higher lands within a certain limited period. The Land Commissioner approved that recommendation and authorized me to sell the lands which aggregated some 8,923 acres, for \$30 an acre,

(Testimony of G. H. Plummer.)

payable one-sixth in cash, the balance in five equal annual instalments. That sale was never completed. The Northern Pacific Railway Company still own the lands within the project.

I wrote a letter, which might be termed an option on January 26, 1912, to W. E. DeLarm, Columbia River Water Company, agreeing to sell at any time before March 1, 1912, the 3400 acres lying below the constructed canals at \$45 an acre payable \$36,000 in cash before March 1, 1912, and the balance to be paid in ten equal annual instalments with interest at six per cent. That money was never paid. Mr. DeLarm, was representing the Columbia River Water Company.

#### Cross Examination.

(By Mr. WOOD.)

Mr. Armstrong's address at the time he wrote us was Kennewick, but a letter addressed to Kennewick, in 1908, was returned to us undelivered. He lived somewhere in eastern Washington. His company was the Columbia River Orchards Company, the same that Mr. DeLarm, afterwards succeeded to. I know of no connection between Mr. Armstrong and Mr. DeLarm.

I fixed the date when Mr. Armstrong called on me by a letter dated February 27th, 1908, in which he stated that he had called at my office and found that I would not return to the City until on the 28th.

(Testimony of G. H. Plummer.)

This letter was written from Tacoma, so I concluded from that that he had called at my office either the same day or the day before, finding me out he went and wrote this letter in which he explained what he wanted. I didn't have a personal interview with him. I had an interview with him on March 2, 1908. He renewed his application for the (*for the*), three sections of land near Wahluke, and on March 13, 1908, I wrote him as follows: "Referring to your application for the purchase of sections 9, 11 and 15, Township 14, 26 East, I have to advise you that the matter was submitted to our Land Commissioner who does not approve of the sale. I explained to you when in Tacoma that all of our lands underlying the Priest Rapids project had been reserved from sale for a number of years past and this reservation is still in effect. Yours truly, G. H. Plummer, Western Land Agent."

On June 1, 1908, he wrote me calling attention to the conversation I had with him about the three sections requesting our decision. He didn't receive my letter, and he added as a postscript also sections 15 and 23 in Township 13-19 except the south half of the southwest quarter of section 23. That constitutes an enlargement of his application to include the other two sections, making five sections of it that he applied for, with a part out of one. As a matter of fact, I think that three or four of the sections are fractional, lying along the Columbia River, which are

(Testimony of G. H. Plummer.)

not full sections.

On June 11, 1908, I wrote him: "Replying to your letter of the 1st instant in regard to sections 9, 11 and 15, Township 14, 26 east, and sections 15 and 23, Township 13, 19 East, I can add nothing to my former advice to you regarding these lands. The matter was submitted to the Land Commissioner but he was unwilling to authorize the sale of any of these lands. Same are being reserved from sale and I regret that we are not in position to consider your application to purchase."

He then took the matter up by letter with Mr. Arthur B. Lee of Spokane, who was one of our attorneys a partner of E. J. Cannon, our division counsel at Spokane. On June 27, 1908, he wrote Mr. Lee quite a long letter. He explained the physical condition to Mr. Lee. The substance of it is that the little land that he is asking for is right along the bank of the river and wouldn't interfere with the bigger project, or something to that effect. That is the point of it, and expressing his desire to see Mr. Lee and explain the matter to him more fully.

Mr. Lee turned that letter over to Mr. Cannon who gave it to Mr. Cooper—to the Land Commissioner, when he was in Spokane in the early part of August, 1908, and Mr. Cooper turned the papers over to me with a letter dated August 6, 1908, in which he said "Referring to the application of the Columbia River Orchards Company to purchase a por-



(Testimony of G. H. Plummer.)

tion of our low lying lands under the Priest Rapids project, as you are aware the position we have taken ever since our examination disclosed the possibility of carrying out the entire Priest Rapids pumping project is we were to keep it as a unit until the time came when the project would be commercially feasible. I do not know of any good reason for changing this position and it is very sure that if we sell the low lying lands that can be watered by gravity it being a low lift, it will be more difficult and perhaps impossible to ever get the higher lands irrigated. Therefore the application of the company named should be declined."

That was the termination of the Armstrong negotiations excepting that I thereupon wrote Mr. Cannon the substance of Mr. Cooper's letter, stating that the lands would not be sold and Mr. Cannon, acknowledge receipt of that letter, and I think that is the end of our negotiations with Mr. Armstrong. Mr. Cannon's letter was dated August 7, 1908, and his reply August 10, 1908.

The next person who came to see us was H. H. Humphreys. He came to see me. He came from Spokane in July 1909, and then he wrote me a letter on the Columbia River Orchards letter head from Spokane calling attention to a conversation that we had had some weeks before and stating that they would like to buy the right of way for the canal. The



(Testimony of G. H. Plummer.)

letter is dated July 23, 1909 and says: "You will recall the writer's conference with you some weeks ago relative to lands from White Bluff, in the vicinity of Wahluke, Washington, which our company proposes to irrigate. You will remember that I spoke to you about arranging for right of way for canal, and you asked that I furnish you with a blue print showing the lines of our ditches. Under separate cover, I am forwarding this blue print to you, and will follow this by the detailed description of route of ditches. We would like a right of way 60 feet wide, but if that, for any reason, was undesirable at any particular point, we could get along with 50 feet." I don't remember the personal conference referred to, or anything that transpired at that time. A blue print was later sent to us. (producing blue print) I believe that is the blue print. I would like to say that I believe there was another map furnished us showing a little more accurately the position of the canal thru two of those sections. I am not sure that that is the map covering all of the right of way. I made a memorandum for the chief clerk to color the lands that we owned on the map so I could see how our interests were affected.

Map put in evidence, marked Defendant's Exhibit "A."

They have marked all of the lands that we own in "red." This map originally came from them. They furnished it.

(Testimony of G. H. Plummer.)

Witness produced another map.

This map originally came from them.

Introduced in evidence and marked Defendant's Exhibit "B."

The witness' attention was called to the memorandum on the smaller map and answered I think that is the blue print that accompanied Mr. Humphrey's letter of July 23, 1909. Exhibit "B." The red marks were put on by an employee of my office and they represent the Northern Pacific lands over which the right of way goes. Not the total holdings of the Northern Pacific. The Northern Pacific would really own every odd section. The same answer was given to Mr. Humphrey as to lands but not as to the right of way. In the letter from Mr. Humphrey, he doesn't apply for agricultural lands, but only apply for the right of way because he was told that the lands were not for sale, but that I would recommend the sale of the right of way and the pump house. I wrote the Columbia River Orchards Company July 28, 1909, acknowledging the receipt of the letter of July 23, and the blue print showing the location of the irrigation canals at Wahluke, "for which you desire right of way 50 feet wide. I notice, however, that the property's pumping station"—that is a misprint, and should be "company's pumping station is on our land, Section, 13 North 25 East, and no reference is made as to whether additional ground will be needed for that purpose. I cannot say wheth-

(Testimony of G. H. Plummer.)

er our people will approve the sale of the right of way and site for pump house, but I am willing to submit the matter to the Land Commissioner when I have full information as to the lands required. You should limit your application to the smallest amount necessary to carry out your plans. Yours truly." In response to that letter Mr. Humphrey wrote me on behalf of the Columbia River Orchards Company, a letter without date which was received by me August 5, 1909, in which he said that the pumping plant proper will be located down next the water on state land "of course contiguous to your section." After that we had some correspondence about the sale of that particular tract that the pump house would be located upon, I claiming that if there were any private rights, that they were in the Northern Pacific Railway Company, and that they would have to buy from us.

He claimed that the pump house would be located below the meander line, and therefore upon state property, state shore lands, and it resulted finally in their recognizing our ownership of any private rights there, and they purchased the pump site, as shown on their maps. We sold them the entire lot. The pump house was situated on Lot 4, Section 3. Township 13, 25 East, and we sold them the entire lot. The date of that was in the deed, a copy of which has been introduced. Dated September 22, 1911. That deed is to the Columbia River Water Compa-

(Testimony of G. H. Plummer.)

ny. The deed was not made in pursuance to Mr. Humphrey's application, directly. The company that came afterwards, Mr. DeLarm and Mr. Wright, as we understood succeeded the Columbia River Orchards Company, and Mr. Humphreys. The original application was made by the Columbia River Orchards Company, thru Mr. Humphreys.

The original application came through Humphrey on behalf of the Columbia River Orchards Company and then later in the negotiation Mr. DeLarm and Mr. Wright, succeeded Mr. Humphrey and we did not know of any change in the name of the company until we were ready to make our deed when we inquired of Mr. Wright to whom the title should run, and he told us the Columbia River Water Company. In the meantime, however, in correspondence that we had with Mr. Wright he had suggested that he would want title taken in the name of James Ellison, who had intended to put up some money, but that was later rescinded and when he came to make the final payment—when we were ready to make the deed he requested that it be made in the name of the Columbia River Water Company.

E. J. Wright, paid for this land by a cashiers check that was handed to us by Mr. Wright June 26, 1911, for \$2700. That was the first payment. That deed conveys the pump house site and also the right of way 50 feet over all our lands. Mr. Wright, was acting as attorney for the company and presum-



(Testimony of G. H. Plummer.)

ably for DeLarm and Biehl.

The next application following Mr. Humphrey's application, is Mr. DeLarm's. He made an application for the purchase of lands and also took up the unsettled right of way matter, which was unsettled at that time, not paid for, and as a matter of fact I had not yet, when DeLarm entered the negotiations, authority to sell the right of way and pump house site, so that while the application was initiated by Mr. Humphrey it was completed by Mr. DeLarm, and his associates. That was by a personal interview on February 15, 1910. After a talk with Mr. DeLarm, I dictated a memorandum covering my conversation with him, I have that memorandum.

Mr. DeLarm said that surveys were being made to accurately locate the line of canal and the pumping station, and that as soon as the surveys were completed and maps prepared he would submit the map to us with formal application for the purchase of a pump house site and the right of way. He said that they had already procured a permit from the state to occupy the shore and bed of the river for their pumping station, which was supposed to be state land. Mr. DeLarm was advised by me that the matter of sale of the right of way would be submitted to the Land Commissioner and that as to our lands underlying their canal the same were not for sale.

From my memory I judge that DeLarm was alone

(Testimony of G. H. Plummer.)

at this interview, otherwise I would have noted it if anybody had been with him.

Mr. Kilbourne, came to see me on June 9, 1910. and while I am not sure I think that was the first interview I had with him. I fix that date by memorandum that I made on a copy of letter that I wrote DeLarm attached to my file in which I note some of the figures that he gave me in reference to the status of the project.

Letter read into the records as follows:

The copy of the letter is dated June 7, 1910. "W. E. DeLarm, Columbia River Orchards Company, 227 Henry Building, Seattle, Washington, Dear Sir: I submitted to the Land Commissioner your application for the purchase of a right of way across certain lands owned by our company in the vicinity of Wahluke and he advises me that he would prefer to leave this matter until he comes west in about three weeks when it will be given consideration. I will then advise you whether or not the right of way can be sold. Yours truly, G. H. Plummer, Western Land Agent." On the bottom of the copy of this letter appears the following notation made by me in pencil. "Plant 70 per cent complete cost \$36,000 to \$40,000. Canal will require about \$20,000 to complete. Said to be about 40 per cent completed. E. C. Kilbourne 6-9-10."

This signature to this letter is in my hand writing also. This has reference to the condition of the

(Testimony of G. H. Plummer.)

pumping plant and canals at the time of the talk with him.

Q. You understood at that time that E. C. Kilbourne, was only the constructing engineer for the plant, didn't you?

A. I don't know that I did. I may have known it, but I don't remember whether he said that was his capacity.

On June 9, 1910, the same date as my interview with him I wrote him this letter. I think I read that into the records in my direct examination. This is a letter to Kilbourne. I received a letter from Kilbourne following this.

Letter June 9, 1910, read into the record as follows:

Letter dated June 9, 1910, "E. C. Kilbourne, 307 First Avenue South, Seattle, Washington. Replying to your inquiry regarding lands owned by the railway company underlying the Columbia River Orchards canal, I beg to say that none of our land in that vicinity is for sale at the present time. All of our holdings being reserved under instructions from the Land Commissioner. I have already submitted to him the application made by President DeLarm for the purchase of a right of way for the canal and power house site, and the Land Commissioner has advised me that he prefers to leave the matter until he comes west the latter part of this month when he will look into it further and determine whether or not sale will be made. I am returning your map here-

(Testimony of G. H. Plummer.)

with as requested. Yours truly, G. H. Plummer,  
Western Land Agent."

Letter from Mr. Kilbourne, read into the records as follows:

"Kilbourne & Clark Company, Engineers, Designers and Constructors of Complete Power, Lighting and Irrigation Plants. Seattle, 307 First Avenue South. Portland, 109 Fourth Street. Charles A. Kilbourne, President and Treasurer, Fred G. Simpson, Secretary and Chief Engineer, Edward C. Kilbourne, Vice President and Manager. July 1, 1910. Northern Pacific Land Company, Tacoma, Washington, Attention of Mr. Plummer. Dear Sir: The Columbia River Orchards Company is anxious to arrange for the right of way for the canal for their irrigation plant at Wahluke. You said that the matter would be taken up on the arrival of Mr. Cooper whom you expected about the 25th of June. We write to remind you of the matter as we presume you have a multitude of affairs to take up with him and this one might be overlooked. If you will be so kind as to notify us when you will have time to see us, we will come over. Very truly yours, Kilbourne & Clark Company, Engineers for Columbia River Orchards Company by E. C. Kilbourne Manager. ECKLS." And the red rubber stamp of the Northern Pacific Railway Company, Western District, July 2, 1910, Land Department, Office of Western Land Agent.



(Testimony of G. H. Plummer.)

The blue print Mr. Kilbourne, speaks of sending was returned to him. I have reference here to another blue print from Mr. Kilbourne, made in April 1911, when Mr. Kilbourne called at the office during my absence and talked with my chief clerk about the Wahluke matter, and my chief clerk made the following memorandum on this letter in this file for me, and later was dictated by me to the Columbia River Orchards Company. This was the last letter on file when Mr. Kilbourne called and the memorandum was made on that letter. There is no connection between the letter and the memorandum. I could only testify to these matters covered by this memorandum, from the memorandum itself. I had no knowledge at that time of the physical condition of the project.

Memorandum read as follows:

This is a memorandum made in pencil by my chief clerk, of an interview he had with Mr. Kilbourne in the latter part of April, 1911, and is supposed to cover the information given by Mr. Kilbourne, to be repeated to me. "Pumping plant paid for, 85 per cent work on ditch completed, machinery will be in in two or three weeks, Pacific Power & Light Company will furnish the power and build the necessary 15 miles of line to pumping site when they have evidence that we will sell the right of way for the canal. The construction of the power line will cost \$30,000. First unit expected to deliver 14,000 gallons per minute during greater part of irrigation season.

(Testimony of G. H. Plummer.)

4|-1911."

Q. Now, as I understand, that has no connection with the letter. Can you give us the probable date of the memorandum?

A. No, sir, only that it was in the latter part of April, which I conclude from my letter to Mr. Kilbourne, or rather, my letter to the Columbia River Orchards Company calling attention to Mr. Kilbourne's visit to my office which was dated April 29, 1911."

I would conclude that that memorandum made by the clerk covers the visit of Mr. Kilbourne, when I was absent towards the end of April, 1911. This refers to E. C. Kilbourne, not to C. A. Kilbourne. I do not remember that I had an interview with C. A. Kilbourne, but I do remember E. C. Kilbourne. As far as my file reveals and as far as my memory goes that was the end of the transaction with Mr. Kilbourne, relating to this matter. When I testified about the number of acres imbraced in this project I was testifying from a memorandum that I made of the history of the transaction.

The letter which I considered as an option was dated January 22, 1912. I wrote Mr. DeLarm of the Columbia River Water Company, confirming the arrangement made with him, A. Miller, and R. S. Chapman, at Seattle, on January 20, for the sale of 3400 below the constructed canal. The lands under the upper lift, the higher lands were eliminated from the

(Testimony of G. H. Plummer.)

proposition entirely when that final proposal of sale was made. The upper lands come into it at the time Mr. Chapman first came onto the scene, in October and November 1911, at which we discussed the sale of 8900 acres under the low and high lift, and at which time I offered to sell the lands at \$30.00 an acre upon condition that they would pay one-sixth of the total consideration in cash and the balance in five equal annual installments, and one of the conditions of that sale was that they were to agree to construct the pumping plant and canals to irrigate the upper lands within a limited time. I think that letter is in the file.

I don't know whether that was a letter or whether it was done verbally, but I had a conference with Chapman, DeLarm and Wright at DeLarm's office on November 9, 1911, at which the terms of the contract were discussed, and two days later I prepared a form of contract, which, however, was for the low lands only; did not include the upper lands because they had advised me that they were not willing to bind themselves to construct the canal and pumping plant to irrigate the higher lands, therefore I told them that we would under no circumstances sell the lands. Up to November, 1911, Chapman, Wright, or any of their associates had nothing that could be considered as an option for this body of land. The only time that we entered into any agreement or even encouraged them in the belief that they could

(Testimony of G. H. Plummer.)

buy those lands was in November 1911, after they had constructed the pumping plant and canal to irrigate seven or eight thousand acres on the low land, on the flat.

We never received any request in writing or by personal interview from anybody as to what right DeLarm or any of his companies had in the Northern Pacific lands, that I remember of.

I don't recall exactly the connection between the Columbia River Orchards Company and the Columbia River Water Company, but my impression is that we got the idea that the Columbia River Water Company was the successor of the Columbia River Orchards Company, and because the same people were handling it.

Q. What was this Priest Rapids scheme, a Carey Act scheme or a government project?

A. No, sir, it was first taken up as a private project by some people who thought they could construct a pumping plant for the irrigation of fifty to sixty thousand acres lying at varying lifts. The matter was first—it first reached a concrete form when we made an agreement with E. H. Libby of Lewiston, Idaho, for the sale of our lands provided he would construct the canal, and when Mr. Libby failed to finance it it was taken up by Mr. Pierce of the Columbia Valley Reclamation Company, the company that owned some water power rights between the head and foot of Priest Rapids which they figured on de-



(Testimony of G. H. Plummer.)

veloping, and in connection with that they were going to irrigate these lands.

I don't remember that this irrigation project was spoken of in the papers, as a matter of fact, we were keeping it quiet, but there was a good deal said about the water power scheme. That was also called the Priest Rapids scheme.

Q. Was it general information easily obtainable that you were selling these lands?

A. Yes, sir.

Q. Now, have you had a good deal to do in your connection as Western Land Agent with irrigation projects, pumping projects and others?

A. Why, some, yes: not the practical end of it, however.

Q. You were on this Wahluke project once, as I understood.

A. Yes, sir.

Q. And was that after the pumping plant was completed and the ditches and canals completed?

A. The pumping plant was partly completed and the ditches were probably 80 per cent completed.

Q. What would you say from your observations as to the character of the work, was it good?

A. The ditch construction looked good to me, but I didn't—I wasn't sufficiently well informed on machinery and pumping plant to say whether the pumping house and machinery that had been installed was sufficient for the work.

(Testimony of G. H. Plummer.)

Q. Did you get any report on it before you gave your options? The reason I am asking these questions, I want to explain to you, is I understood that your yielding your rule in the selling of land was conditioned that they would put in a good project and reclaim these lands. I don't know, of course, what your knowledge is, but I am inferring that either you yourself looked it over or had some report; that you wouldn't have given them these lands unless you thought they had a good project that they were carrying out, that is what I am asking.

A. Why that is partly true, but the situation as it was put up to us was this: Mr. Chapman stood ready to finance the whole project provided the Northern Pacific lands could be acquired, and he told me that before they would close their arrangements with the company for the acquisition of the pumping plant and canals, he would have the project carefully investigated, the canals and pumping system examined to make sure that it was sufficient and suitable for the irrigation of the land, and we relied on him to do that. In other words, we were perfectly willing to sell our lands under the conditions named provided the project was going to be thoroughly investigated, as we were assured it would be investigated, before the money would be put up.

Q. Who was Chapman?

A. R. S. Chapman came from Chicago with a let-

(Testimony of G. H. Plummer.)

ter from Mr. Cooper to me and it was our information that he was pretty well connected with big financial interests and would be able to finance it, which I think was true. He was connected with and has done a good deal of work for Byllesby & Company as an expert.

Mr. Chapman remained at Seattle, for a number of weeks thoroughly investigating conditions pertaining to the company, and finally concluded that he would not be able to put the scheme thru.

Whereupon the Court adjourned.

Court having adjourned until afternoon, the cross examination was continued.

The witness stated that he was unable to find the letter referred to in his previous testimony in regard to the contract for the sale of the land lying below the constructed canal, and testified I find the negotiations were with the parties verbally, and it finally resulted in the preparation of the contract of which I have a copy here, which, however, was not executed. That contract was prepared and submitted to them for approval. It embraces 3401.23 acres below the constructed canal. Our negotiations for the larger area did not reach the point of preparing a contract, because they were not willing to accept the conditions which I imposed on them for the construction of a canal to cover the upper lands. The negotiations for the larger area had just prior to the preparation of this contract. They were had in Oc-

(Testimony of G. H. Plummer.)

tober 1911, with DeLarm, Chapman, Wakefield, who I think was acting on behalf of Senator Clapp, and Mr. Wright, who was connected with the transaction. Mr. Wakefield, I think, was in the investment business in Seattle, and in this deal I think he represented Senator Clapp. The date of this contract, which was not executed is November 15, 1911. It was not executed because they desired that the sale be made in separate contract for each section, and also I think, as a condition they wanted the contract to run to either Mr. Wakefield or Sen. Clapp personally. I did not wish to do that, as I wanted if possible, to have them run to the company who owned the canal and the pumping plant that would serve the land with water.

The letter which I wrote to Mr. DeLarm, which might be considered possibly as an option is dated January 22, 1912, Submitted copy of that letter, which was introduced in evidence marked Defendant's Exhibit C. This is the only thing that could be considered in the nature of an option. They never had an option of the 9000 acres. We had, however, reached an agreement as to the sale of the 9000 acres, provided, they would comply with such conditions as we imposed, which they were not willing to do. That was the Chapman crowd, and was just preceeding this option given here, the month preceeding October 1911.



(Testimony of G. H. Plummer.)

Redirect Examination.

(By Mr. WILLIAMS.)

The contract that was drawn up and not executed was in the name of the Columbia River Water Company. I did have a talk with Mr. Wakefield, and that was one of the bones of contention, (referring to the large tracts), that he wanted us to sell the lands under contract, separate contract, for each separate section without any conditions and that the contract should run to him personally, and that I declined to do. My recollection is that Mr. Wakefield, was acting for Mr. Clapp, and that it would have been satisfactory to have made the contracts to either of them, but they didn't want to have the contracts run to the Columbia River Water Company. My remembrance is that they were to make some arrangement with the Water Company, whereby they were to have conveyed to them water rights for the lands that they were going to purchase from us so as to further secure them in the carrying out of the scheme for irrigating them.

Q. In answer to a question of Colonel Wood's this forenoon, you stated that Mr. Chapman thoroughly investigated the company; what company was that he thoroughly investigated?

A. The irrigation company. I understand that he looked pretty fully, as far as it was possible to do so, into the affairs of the Columbia River Water Company, and later he gathered all the facts in connec-

(Testimony of G. H. Plummer.)

tion with all of the companies that were interested in the project, there.

**[Testimony of J. H. Edwards, for the Plaintiffs.]**

J. H. EDWARDS, called as a witness for plaintiffs, testified under oath.

(Questions by Mr. BRYSON.)

I am connected with the Dexter Horton Trust & Savings Bank of Seattle. Dexter Horton Trust & Savings Bank, changed its name from Washington Trust & Savings Bank, last September. I am vice president and trust officer and became such the first of February 1911. The Washington Trust Company of Seattle, was amalgamated with Dexter, Horton Bankers in August, 1910, at which time Dexter Horton Company was nationalized and became the Dexter Horton National Bank of Seattle, and the Washington Trust Company became the Washington & Savings Bank, the National Bank taking over the commercial business of both institutions, the Trust Company taking over the savings department, trust business, escrows and miscellaneous.

I was acquainted with W. E. DeLarm. Met him early in 1910 at the time of my connection with the Washington Trust & Savings Bank. There was a trust there with the Columbia River Orchard Company. It was trustee for a bond issue, the securities were mortgages, five mortgages as I recall. The trust was regulated and controlled by a trust agreement

(Testimony of J. H. Edwards.)

between the Columbia River Orchard Company, and the Washington Trust Company, of Seattle. Certified copy of this trust agreement introduced in evidence marked plaintiff's Exhibit 5, under objection as irrelevant and immaterial.

Certified copies of the following documents were introduced in evidence over the objection that they were irrelevant and immaterial and marked plaintiff's exhibits as follows:

Certified copy of trust agreement of May 21, 1910. Plaintiff's Exhibit 5.

Certified copy of Desert Land Mortgage from Virgil H. Robinson and wife, to the Columbia River Orchards Company, and the assignment to Columbia River Orchard Company, and assignment to the Washington Trust Company, Plaintiff's Exhibit, 6-a, 6-b and 6-c.

Certified copy of Desert Land Mortgage from Emil F. Cords to The Columbia River Orchards Company, Plaintiff's Exhibit 7.

Certified copy of water right contract, between Frederick C. Koppen and The Columbia River Orchard Company, and assignment of the same, Plaintiff's Exhibits 8-a and 8-b.

Certified copy of desert land mortgage from Alfred Gagner and wife, to The Columbia River Orchard Company, Plaintiff's Exhibit 9.

Certified copy of desert land mortgage Laura Wattle and husband to The Columbia River Orchards

(Testimony of J. H. Edwards.)

Company, and assignment to The Columbia River Orchard Company, and assignment to Washington Trust Company, plaintiffs' Exhibits 10-a, 10-b and 10-c.

The Trust Company resigned shortly following my connection with the company and I took a receipt from the succeeding trustee. I have the receipt and it contains a true and correct description of the securities that were held by the Washington Trust Company, although, I think in one instance there was a clerical error in the description of a portion of the land that was discovered afterwards. In the Gagner mortgage it says, "covering the SE $\frac{1}{4}$ " and should have been the SW $\frac{1}{4}$ . Receipt offered in evidence marked Plaintiffs Exhibit 11. The date of the receipt is March 28th, 1911. Three affidavits made by Mr. DeLarm, were produced, which being identified by the witness as documents referred to in the receipt were introduced in evidence, under objections, marked plaintiffs Exhibits 12-a, 12-b and 12-c.

I had some correspondence with reference to our resignation. I have the original letter dated February 3, 1911 written to our company signed by the Columbia River Orchard Company, by W. E. DeLarm, President, and attest, A. J. Biehl, Secretary. Letter identified and introduced in evidence, marked plaintiffs exhibit 13.

Witness identified letter from J. H. Edwards, vice president to the Columbia River Orchard Company,



(Testimony of J. H. Edwards.)

dated February 7, introduced in evidence over same objection, marked plaintiffs exhibit 14.

Another letter same date, produced and identified, introduced in evidence over same objection, marked plaintiffs exhibit 15.

Certified copy of the notice of resignation of the Washington Trust Company dated 31st day of January 1911, was introduced in evidence over same objection, marked Plaintiffs Exhibit 16.

Witness identified the original assignment March 16, 1911, from Washington Trust Company of Seattle, to the Oregon and Washington Trust Company, introduced in evidence over the same objection, marked plaintiffs exhibit 17.

The receipt is the one held by my company. There were \$59000 in bonds and outstanding at the time, none of which had been returned to the company for cancellation. I do not recall any abstract of title, accompanying these mortgages or opinion of any attorney upon the title or anything of that kind. I don't think there were any, they would have been referred to in the receipt if there had been. Our company made no guarantee of these bonds.

I met DeLarm sometime previous to the time when my connection with this company began. At the time I was vice president and manager of the Seattle Trust & Title Company. About February 1910, DeLarm Called, Biehl called once then he brought DeLarm afterwards. We had two or three confer-

(Testimony of J. H. Edwards.)

ences. He wished us to underwrite a proposed bond issue on their project over on the Columbia River. He explained the project but we made no investigation of the matter in detail, of the project. I outlined what we would require. We told them that if we did so they would have to furnish us a detailed statement of the amount of cash they had, already invested and engineer's report, which if it was not by an engineer whom we would approve we would have it checked over by our own engineer at their expense; that I, or one of the other officers would want to go over and inspect the proposition in general as well, abstracts would have to be furnished and same approved by our own attorney regardless of any opinion we might have. All these, of course at their expense. If that was satisfactory, we would then *consider* possibly the proposition with them for underwriting. They were in several *times* talking it over and meantime I investigated them as to where they were from, their affiliations etc., and we decided that we would not undertake it. I did not notify them of our decision because they never came back to a definite proposition. I had a conversation about that time with E. C. Kilbourne.

After I had had one or two conferences with them, Dr. Kilbourne *dropped* in to see me, and simply expressed himself that he was glad to know that the Trust Company and the city was inclined to take hold of good industrial enterprises, things which

(Testimony of J. H. Edwards.)

would help in the development of the country; and I gathered that he might have some association with the *the* company, as to installing that project. I told him, as I recall it—of course, it is indefinite recollection now—that we were considering it; had talked the matter over with them; that we would be interested, of course, in a good legitimate enterprise, providing we were satisfied that the parties behind them were, with the assistance that we would decide to give them, capable of putting it through successfully, both financially, and as to their ability, executive ability, etc.

Q. When Mr. Kilbourne came to see you, did he know of the efforts they were making to get your company?

A. I don't know, I am sure; I suppose he did, or he wouldn't have dropped in.

Q. Who brought the subject up? You or he?

A. He—as to the particular company, you mean?

Q. Yes.

A. I don't recall as to that which one spoke of it first, but we both understood, after we had talked a little while. I think, that it was in connection with that project, that we were chatting.

The investigation I made was the previous connection of DeLarm and Biehl. They were formerly in Everett, Washington, or DeLarm, was with some Veneering Company, that he had attempted to finance there. After investigation I decided that they had

(Testimony of J. H. Edwards.)

no money, it was too much of a promotion scheme, that they had no financial backing and we did not care to put up the money for somebody else to work on.

Cross Examination.

(By Mr. WOOD.)

Dexter Horton Trust & Savings Company was a consolidation of Dexter Horton Company, the old bank, with the Washington Trust Company of Seattle. The Dexter Horton nationalized and took over the commercial end of both institutions, the Washington Trust Company, took over the savings and trusts and escrow and miscellaneous of both institutions. The Dexter Horton Trust & Savings Company, does the saving and trust business for the Dexter Horton National. Their correspondent in this city are Ladd & Tilton, and I believe the Dexter Horton bank has the same standing in Seattle, that Ladd & Tilton, has here. The integrity and financial ability of the Washington Trust & Savings, the one that was amalgamated was good, I never heard anything to the contrary, they had a very good standing. Some of the strongest people of the city were connected with it. Mr. J. W. Clise, was president and is now chairman of our board. Mr. C. J. Smith, was vice president, he used to be here in the old Oregon Railway and Navigation Company. A. S. Kerry is vice president and J. M. Frink, president Washington Iron Works was a directors. They were men of



(Testimony of J. H. Edwards.)

standing, leading men of the city, they had some three and a half million at the time of the amalgamation.

The underwriting was with another institution with which I was connected. That was a different institution, they came to us as I say about February, It was the Seattle Trust and Title Company, that was prior to the Washington Trust Company acting as trustee to the bond issue some three months prior. I never was connected with the Washington Trust Company, under the old name. The name was changed to Washington Trust & Savings Bank when I went with them.

Q. And the Seattle Trust Company, declined to further consider any question of underwriting, because you found on investigation, that DeLarm and Biehl had no financial ability?

A. I said that we decided, our committee, that we would not act even if they wished us to, but they never came to the point so that that— — —

Q. Wished you to?

A. They never came to the point of saying that they would put up money enough for us to make the investigation, so I don't think we ever told them of our decision, because they never came to us.

Q. I was trying to get at the reason for your decision, Because you found them to be men without financial standing, without financial ability?

(Testimony of J. H. Edwards.)

A. Yes, and they had not been successful in enterprises they had handled.

Q. Now, the bonds with the Washington Trust Company, how many bonds were issued under that trust?

A. \$59,000.

Q. And what was the total allowable issue?

A. I will have to refer to that trust deed which I have here

Q. Was it \$300,000?

A. I was just looking to see. I had it in my mind there was no limit, as long as they put up securities \$125. for each \$100. I don't see there is any limit in here. It is so long since I have read this.

Q. I had the impression that the first issue was limited to \$300,000.

A. (Reading.) "Amount of bonds which may be issued in any series under this trust agreement shall be limited only by the amount of collateral deposited with the trustee, to the amount of 125 per cent for every \$100. of bonds issued hereunder."

Q. Then as I understand it, the conditions were that, provided they put up \$125, in securities, against \$100, par value of bond the securities to be subject to your consideration and approval, you would permit the bonds to be issued, or would issue them?

A. Yes, Not approval, of course, as long as they put up the security.

Q. Weren't those securities in any way subject

(Testimony of J. H. Edwards.)

to your consideration? Who was to say that they were \$125. in value. Was it to be just the face?

A. The president of the Columbia River Orchard Company. That is what those three certificates were for.

Q. You had no responsibility, then, in passing upon the value of the securities?

A. No, sir.

Q. This issue of \$59,000., while it was in your hands, did you know anything about the sale of these bonds?

A. No, sir.

Q. I don't mean as an officer of the bank, or as a citizen of Seattle, or in any way, do you happen to know whether they sold at par?

A. No sir, I do not.

Q. Do you know anything about their reputation?

A. No.

Q. Whether they were considered good?

A. At that time, you mean?

Q. Yes.

A. No, at the time of sale. I didn't hear anything about it, in fact, I didn't know that the bond issue had been made until I went with the institution in January, 1911, when I was looking over the trust files to see what was there, I discovered it. That was the first I knew any bonds were ever put out by the company.

(Testimony of J. H. Edwards.)

Q. Well, after that day, and before you transferred it over to the Oregon corporation, did you have any knowledge as to the market value of the bonds?

A. No, sir. I knew—I was satisfied there was no market for them, because a good many people came in and asked us about it, asked me as trust officer, and I told them we knew nothing; that I could find nothing in the files showing that any investigation had ever been made by anybody connected with the Trust Company

Q. That was the Washington Trust & Savings?

A. Yes, sir.

Q. That had the mortgage?

A. Yes, sir.

Q. At what time was it that you had the conversation with Mr. Kilbourne?

A. That was early in February, I think; February or March, somewhere along there, of 1910. That was before this bond issue was put out, when DeLarm and Biehl were first talking with me, and I was representing the other trust company, Seattle Trust & Title Company.

Q. You knew Mr. Kilbourne, did you, at that time?

A. Yes, sir.

Q. Was he a resident of Seattle?

A. Yes, sir.

Q. Did you know the other Kilbourne—C. A.?



(Testimony of J. H. Edwards.)

A. Not at that time. I have met him since.

Q. You have known him since?

A. Yes, sir.

Q. Did you know the business they were in at that time?

A. I knew the firm of Kilbourne-Clarke.

Q. Engineers?

A. Yes, sir.

Q. Now in this conversation that you had with Mr. Kilbourne was that an interview sought on either side, or just accidental and casual?

A. I don't think—it wasn't sought. Mr. Kilbourne used to come into our office quite frequently. We had an abstract of title business connected with it. We used to see him in the office quite frequently. One time when he was in, he dropped in and commenced to chat about it, not in particular about this company to begin with; it was more that he was asking what our plan was, of business; and I explained it to him, and he said he was glad to see that we were willing to undertake to underwriting any legitimate enterprise, etc. This was spoken of, as I testified before; I don't recall which one brought it up first.

Q. This was spoken of as a mere incident in a general conversation?

A. Yes, sir, I took it that he wanted to know if we were going to underwrite it, and we discussed

(Testimony of J. H. Edwards.)

that. I told him we hadn't arrived at a decision yet.

Q. By underwriting, you mean in a sense guaranteeing the bonds and helping finance it, and looking after the management?

A. No, not guaranteeing; buying the bonds, underwriting the loan.

Q. I want to know what you intended by it, that you would buy the bonds and resell them?

A. Resell them or carry them, whichever we—of course, we buy with the view of reselling them.

Q. In buying them would you have any condition that you should have any voice in the management of the business?

A. I most certainly would, unless I knew the people pretty well. Would want to watch the disbursement of the money, which is ordinarily done by the trust company underwriting.

MR. WOOD: I would like to make Mr. Edwards for convenience, our own witness for a question.

Q. I will ask you if you knew the general reputation in Seattle, for integrity, of this Mr. E. C. Kilbourne, you were talking to?

A. Good, as far as I know.

Q. You knew at this date, now, the general reputation for integrity of the other Mr. Kilbourne, Mr. C. A. Kilbourne?

A. Good, as far as I know.

Q. And your position in the bank would enable

(Testimony of J. H. Edwards.)

you to know if there was any doubt on that, wouldn't it?

A. Well, Mr. C. A. Kilbourne does business with the bank and stands well. Mr. E. C., I don't think does business with the bank. I just know of him in a general way.

Q. I don't mean the personal business with it; I mean your business as a banking officer, would lead you to know if they were considered shady men?

A. Yes, yes, would have my opinion.

Redirect Examination.

(Questions by Mr. BRYSON.)

The Washington Trust & Savings Bank, had no connection with the bond issue of 1911, this was May 1910, at the time of talking with Mr. Kilbourne, Mr. Kilbourne, happened to drop in. I may have written the letters in regard to DeLarm and Biehl, but I hadn't received the answers for I know at the time I was talking with him we had not. That was the only conversation I recall having with Mr. Kilbourne about it.

**[Testimony of R. J. Brazell, for the Plaintiffs.]**

R. J. BRAZELL, called on behalf of plaintiffs testified under oath.

I reside in Portland, Oregon, three years, occupation lawyer; age twenty-four years, have been practicing for three years.

(Testimony of R. J. Brazell.)

I knew Mr. George C. Hodges, don't know where he is now. I got a card from him in November 1912. just a post card. He was at Victoria, British Columbia. I had one share in the Washington and Oregon Trust Company, and was secretary. I first met Hodges in Tacoma, about four years ago I think. I met him in Tacoma, at christmas 1910, and he asked me to go over to Seattle, to meet a couple of men who were thinking about going into business in Portland, and I went over on the boat with him one morning, and he introduced me to Mr. DeLarm and Mr. Biehl. I think I was there about ten minutes, and they told me they were thinking about forming a bank or trust company in Portland. They asked me to write to them what the banking laws of Oregon was. I wrote them after I came back letter of December 20th, 1910, handed to witness. This is the one that was in response to their request for me to write.

The letter introduced in evidence over objection as irrelevant, and immaterial, marked Plaintiff's Exhibit 18.

Minute book of the Oregon and Washington Trust Company handed to the witness. Witness testified that he kept the book as secretary of the company, while he was in it. Witness examined the minutes under the heading of January 25, 1911, testified that they were the first minutes, and examined page 2 and identified it as the subscription to the capital



(Testimony of R. J. Brazell.)

stock of the corporation, and testified that the subscribers subscribed their respective names and the signatures were theirs. Identified page 4, as the original minutes of the stockholders meeting and pages 5 to 12 as the minutes of the corporation, and page 13 and the succeeding pages as the minutes of the board of directors, the minutes of the first meeting, the subscription to the capital stock, the minutes of the first meeting of the stockholders and the minutes of the first meeting of the board of directors were introduced in evidence, over objection as irrelevant and immaterial, and marked Plaintiff's Exhibits 19, 20, 21, and 22.

Q. Mr. Brazell, I will ask you if you received the securities that were held by the Oregon and Washington Trust Company, that were mentioned in the bonds of the Columbia River Orchard Company.

A. I did not receive them, except that I received the key to them.

Q. Who held these securities?

A. Why, Hodges held them, and when he went away, I think in August 1911, there was nobody in town, nobody belonging to the company, to give the key to, so he left it with me and said when the company elected a trust officer, for me to turn the key over to whomsoever would be elected, so I simply held the key; I never saw the securities, and never went near them.

(Testimony of R. J. Brazell.)

Q. Who did take possession of them afterwards.

A. Biehl.

Q. Did Mr. Biehl give you a receipt for them?

A. Yes, at the time Mr. Hodges gave me the vault, he had a list of all these securities and papers, and he had a duplicate, and he handed it to me down at the train. He said those things were all complete, and asked me to receipt for them; so I simply took his word and receipted for them, but I had never seen them at all.

Q. And you turned the key over to Mr. Biehl?

A. Yes, sir, after he had been elected trust officer. And at that time I turned them over, I checked them off to see if they were all there, and they were, just as the list was written.

Q. With whom did you check them over?

A. Biehl.

Q. What did you check them over from?

A. Well, he gave me a duplicate.

Q. Did he have the book there with the list of the securities in it?

A. I don't recall that he did.

Q. What is that?

A. I don't recall that he did. I don't think that I saw any.

Q. What was it you checked them over with then?

COURT: The list. When Hodges went away, he gave Mr. Brazell a list.

(Testimony of R. J. Brazell.)

A. A list and duplicate of it. He took the original and left me the duplicate copy, so that I could use that to check with the next man.

COURT: You used that list to check with Biehl?

A. But I never checked with Hodges at all. I took his word for it.

Q. You just checked it over with Hodges' receipt?

A. Yes, with his duplicate receipt. There was about four or five pages.

MR. WOOD: Never checked it over with Hodges?

A. No.

COURT: When Hodges went away, he gave Mr. Brazell what purported to be a list of the securities, and Brazell receipted for them, and gave him a duplicate at the same time. and when Brazell turned them over to Biehl, he checked with that receipt.

Q. Did you ever see that book?

A. I don't think I ever did. The receipt that Mr. Biehl gave me was turned over to the Government at the time of the Biehl trial. I identified it at the time of the Biehl trial.

Witness was handed letter dated May 15, 1911, addressed to F. C. Koppen, signed by witness, as secretary. The witness continued and testified that I signed the letter at Hodges' instance. I did not write the letter at all. I didn't dictate it or write it. Hodges wrote it and merely asked me to sign

(Testimony of R. J. Brazell.)

it said he wanted it signed by the secretary. I knew nothing of the contents, or whether it was true or not, but I presumed that it was. I had confidence in Hodges. He had my fullest and complete confidence. If there was anything wrong with it, I didn't know it. If I had, I certainly never would have allowed my name to be used with it.

Letter introduced in evidence over objection as irrelevant and immaterial, and marked Plaintiff's Exhibit 23.

The Oregon Trust Company had no attorney except Humphrey. Hodges used to asked me to do something for him once in a while. Mr. Humphrey was a member of the company, of all the companies. He was an attorney and he did all the work done here. I never was attorney for the company, except that Hodges consulted me once in awhile. He asked me to notary some papers. I don't know whether the Oregon and Washington Trust Company held any abstracts of any kind, the property belonging to the Columbia River Orchard Company or the Washington, Orchard Irrigation and Fruit Company. I never heard of any, none of the papers ever came into my hands, except the minute book. They never had any meeting after the first meeting in January, except what shows there except the resignation of directors and election of new ones. No other business was ever transacted by the corporation after that time. I never heard of any other



(Testimony of R. J. Brazell.)

transaction that the Trust Company had except these matters of the Columbia River Orchard Company. I paid nothing for the one share of stock I held. Simply transferred to me to enable me to become secretary. It was handed back to them. I had no financial interest in it, never a cent.

Cross Examination.

(By Mr. WOOD.)

Mr. Brazell, I notice a deed has been introduced here in evidence, by which certain lands were transferred from the plaintiff Tobey to Mr. Kilbourne, to which you affixed the notarial certificate as notary, and under the testimony, if I remember correctly, that deed was prepared and drawn up in Hodges' office? Did you and Hodges have offices together?

A. No, we did not. That deed was drawn up in my office over in the Commercial Building, and it was not acknowledged that day, but afterwards Hodges had it, and he called me up over the phone and asked me to come over and take Tobey's acknowledgment. I went over to the office, and took the acknowledgment and went right away.

Redirect Examination.

(By Mr. WILLIAMS.)

The acknowledgement was taken the day it appears. It certainly was. I couldn't say how long the deeds were drawn before the acknowledgement was taken, must have been a day or two, wasn't that same day, because I remember that Tobey, and also

(Testimony of R. J. Brazell.)

Kilbourne were over to my office in the Commercial building helping to draw up these deeds. There was an awful bunch of abstracts they had to go over to consolidate all this property so as to make it in one or two instruments. I don't know how many there were, but it was an awful big bunch of abstracts, and he wanted to consolidate it in to one deed.

Q. Did Mr. Kilbourne say that?

A. Yes, the gentleman, the first gentleman here.

Q. Edward C. Kilbourne?

A. Yes, sir.

It was a day or two after that before the acknowledgment I would believe.

Q. Who told you to prepare the deed in the name of Kilbourne?

A. I don't know who told me that, either Hodges or Tobey I don't know which. I know Mr. Tobey is the one that paid me for drawing the deed.

Recross Examination.

Q. Do you know whether or not the name of the grantee was written in the deed at all, or a blank left?

A. I couldn't say as to that, but if it is type-written in the same kind of type it was written at that time.

Q. We haven't got the original here. I was just wondering whether you remember or not.

A. Well, I think Mr. Kilbourne's name was writ-

(Testimony of R. J. Brazell.)

ten in, because he was over at the office at the time, and they told me it was being transferred to him.

Q. With Mr. Tobey?

A. Yes, sir.

Q. Which of the Kilbournes?

A. I don't know which one. I had never seen them before and have never seen them since.

Q. Well, who told you the deed was to run in the name of *Kilbourn*?

A. I don't know; either Hodges or Kilbourne or Tobey. There was three of them there together. I don't know which.

Q. Are you sure Tobey was along?

A. Well, I know one of the Tobey's was over in the office, yes.

Q. At this time?

A. Yes, I don't know which Tobey it was, yet I know he was there.

Redirect Examination.

Q. You may state whether or not any money passed through your hands?

A. What money?

Q. In payment of the stock of the Oregon and Washington Trust Company?

A. Why, I wasn't treasurer.

MR. FLEGLER: There was no objection on the part of either one of the Tobey's to having the deed made out to Mr. Kilbourne?

(Testimony of R. J. Brazell.)

A. I never heard of any. They paid me for drawing them.

[Testimony of C. J. Steeples, for the Plaintiffs.]

C. J. STEEPLES, being sworn as a witness for plaintiffs, testified as follows:—

I reside at Seattle, have resided there fourteen years, my occupation is a stock broker. Have been in that business about 12 years. My age is 60. My office is located at 102 First Avenue South, right under the Northern Pacific ticket office on a prominent business street. The office is in the basement, practically the ground floor in a few steps down from the street. We buy and sell securities and bonds and handle them on commission.

I had acquaintance during 1911 with the Columbia River Orchard bonds. Knew what their market value was from time to time during the year 1911. During February 1911, I have no record, but during March I would say they were in the neighborhood of 40c on the dollar, in April the first sale that I made was April 4th, I sold \$2000 worth par value of these bonds at 19c on the dollar, these were February bonds. During the remainder of the year they kept *dropping* from that time on. If I can just refresh my memory from a little memorandum I have here, May 11th was the next deal I made. I sold \$6000 worth of these bonds at a basis of 10c on a dollar, May 13th, \$2000 on the same *basis*, May



(Testimony of C. J. Steeples.)

16, \$4000 on the same basis; May 19, \$3500 *bais* of 9c; on the *said of* May 27 \$1500 on a basis of 9c on the dollar and from that time they were still falling on the market. They dropped during the year round two or three cents on the dollar.

From March 1st., my first recollection of them was on the basis—at least they were being offered on the basis of 40c, but my recollection is that they were gradually *dropping* down until April, but just what the gradation, is I don't know as did not handle any during that month, but it was somewhere between 40 and 20c on a gradual sliding scale. The bonds were generally known there in the market. I am a member of the Seattle Stock Exchange. The Stock Exchange never listed the Columbia River Orchard bonds. Its purpose is to facilitate the buying and selling of stock and other securities in the open market. It is the meeting place for the brokers for the transaction of business. We never investigated the standing of the Columbia River Orchard Company. The stock Exchange as a rule investigated and passed upon the bonds that they listed. When a security is listed on the Exchange it is always investigated by a committee and securities committee. The Columbia River Orchard bonds were not discussed formally, they were discussed informally among the members. They were never offered to the Exchange for listing. I do not know DeLarm. I know Biehl. None of the officers of the Columbia River Orchard Com-

(Testimony of C. J. Steeples.)

pany ever offered these bonds to be listed with the Exchange. The bonds were offered for 40c, but I don't know of any sales made at that price. That was simply an offer without a sale. I do not know where the bonds came from as a matter of fact.

The general character of the trading in these bonds generally for, they were bought and handled for trading purposes. That is as I understand it, to trade in for real estate and for equities and things of that kind. They were not so much bought for investment as for trading purposes. That was my understanding of it. I don't know of anybody that did keep them for investment or bought them for investment.

Cross Examination.

(By Mr. WOOD.)

The first personal deal that I had with these bonds was in the month of April, on the 4th day of April, was the first sale I made in these bonds. That was at 19c. I made sales in May on the basis of 9c. This particular block of bonds sold on the 4th day of April, I got from a man by the name of Stevens, John Stevens in Seattle. He was what I called a curb stone broker, not a member of the exchange. I don't know that he had any connection with DeLarm or the company. The same man I bought these from, I sold at 19c, offered the bonds at 40c on the first day of March, according to my record. That was \$1100 par value, the ones that I sold at 19c was not the same

(Testimony of C. J. Steeples.)

block, first was \$1100 worth and this latter block was \$2000. Prior to those offered at 40c early in March I had no knowledge of the bonds at all. This value of the bonds I should say it would be a matter of common knowledge among the brokers at that time, on March 1st, around that time. It would hardly come to me alone in the business you know. Any person interested in the purchase or sale of these bonds I don't think would find any difficulty in ascertaining their value by inquiring in Seattle.

**[Testimony of F. C. Koppen, for the Plaintiffs.]**

F. C. KOPPEN, called as a witness on behalf of the plaintiffs, being duly sworn testified as follows:

(Questions by Mr. WILLIAMS.)

I reside at Wahluke, Washington, have resided there about 13 years, my occupation, I do a little fruit raising, and store business and run a post office. I did some work there in locating settlers in the vicinity of Wahluke, not a great deal. It stretched over quite a period of time, about three years I think.

I am familiar with the lands that come within the irrigation scheme originally promoted by the Columbia River Orchard Company. I was not in the company itself, but was familiar with their project.

Witness was shown defendants Exhibit A, and stated it is a fair representation of the land lying

(Testimony of F. C. Koppen.)

within the Wahluke project promoted by the Columbia River Orchard Company.

The ridge represented, running from the Columbia River, round the town of Wahluke and back from the Columbia River is in the neighborhood of 300 feet, almost straight up and down. The character of the ground lying between that ridge and the Columbia River is quite level. There are no ravines running thru it and no draws, I would not call them draws, nothing you could call that. The white line running from the river just below Section 34, of Township 14 North 25 East running up around the Township 26 east represents the ditch that they built there and the white line striking off thru section 20 is another, that is another fork of the ditch. It slopes toward the ridge north and west from the ditch it doesn't all slope towards the north. The highest ground is about here, (indicating) from there it slopes from this ditch and the river then along here, (indicating) it slopes from the ditch.

The square down here in Section 3 in Township 13 North and 25 east represents the pumping station. The high land above the pumping station is a little over 80 feet from the river level, pumping the water up from the river level to the ditch it has to be raised about 80 feet. The rise and fall of the river at various times of the year is about 20 feet. Now in order to water the lands to the north and west of the ditch, a new ditch would have to be dug. They



(Testimony of F. C. Koppen.)

have had several schemes I think the last they decided on was to put in another station here, indicating, and put out of this ditch *and put out of this ditch* about the middle line of Section 20 on a slight high ground here and run both ways from there in all directions. I have heard the engineers say that it would require an additional lift of 30 feet if they took it here in Section 34 that would cover a tract of land in here. The land above the ridge, the first of it could probably be reached by 200 feet in here, and for this (indicating) would be from 300 to 600 feet very little as low as 200 feet.

The Columbia River Orchard Company, or the Washington Oregon Irrigation and Fruit Company had within the Wahluke project at one time 80 acres in Section 10, but they sold part of that to different people, and I don't know what part they had at any particular time, and they had a contract on Section 20 and half of Section 16, and east half of Section 16. Then a little later on they purchased some more in Sections 10 and 3, little fractions along here next to the river. They got them from me, there was between 39 and 40 acres I suppose in those three fractions. They had half of Section 10. They had about 315 acres. They did not have that until later on in the year 1911. I have the date of that purchase. The character of the ownership of Section 16, was a contract from the State of Washington. I heard DeLarm & Biehl and all connected

(Testimony of F. C. Koppen.)

with the company say so. That is all the knowledge that I have of the ownership of these lands. DeLarm told me that they had a contract for Section 20, from Maltbie and Friel, and I think some others interested in them, Davis. He told me they paid \$100, paying \$64000 for the section. Mr. DeLarm, told me one time that they had an interest in Section 36.

Question by Mr. Wood: Are you a civil engineer?

A. No, sir.

Mr. Wood, interposed an objection to his testimony about the engineering feature of the scheme, and his testimony as to the ownership of the land, and moved to strike it out as incompetent, irrelevant and immaterial.

COURT: I suppose he can testify as to what DeLarm and Biehl said, as that is one of the important features in this case to show what fraud in the issue of these bonds.

Witness continued, I have located a number of the corners of the sections within the Wahluke project to show people where the lands were that they intended to file on. I found a number of the, there aren't many left.

DeLarm said in regard to Section 36, that he had had trouble with the owner of the land and couldn't very well buy it directly from them, so he gave it to a friend of his.

Mr. Wood interposed the same objection.

(Testimony of F. C. Koppen.)

And gave a friend of his \$3,000 to go and make the first payment on that and hold it in his name or his friend's name until he got ready to pay the rest and have it turned over to himself.

The town of Wahluke, is all above Section 10. They got yhe land upon which the town of Wahluke is situated from Mrs. Koppen, my wife. The east half of Section 16 and all of Section 20 is sub-divided into lots 5 acre tracts. I heard from the purchaser and the company, the officers of the company, that they were sub-divided into 5 acre tracts in order to make the parcel small enough that people could afford to buy. These were the lands upon which they were giving contracts. Section 10 was laid out the same way. It wasn't at first. It was laid out in squares, 10 acre tract, different from what the plat shows here.

Mary A. Domay, s my mother-in-law, my wife's mother. She had 160 acres in the Wahluke project in Section 10-14-26. At one time she appointed me as her attorney-in-fact, for a short time, but generally Mrs. Koppen, did her business for her. As her attorney-in-fact, I gave the Columbia River Orchard Company a water mortgage covering her land. That was the other land, *thoug*, besides this 160 acres. She had 40 acres that she held under the Desert Land Law. It is in Section 10. I don't believe I could give a description, unless I should mark it out, the whole section on a piece of paper.

(Testimony of F. C. Koppen.)

Mortgage was shown witness. I didn't do the writing in that. The mortgage covers the 40 acres given by her. I am pretty sure it does. The description of the 40 acres given in the mortgage is SW $\frac{1}{4}$  of the NE $\frac{1}{4}$  of Section 10, Tp. 14, N. Range 26 E. W. M., and then there is an addition. This covers more than the 40 acres. The additional is the SW $\frac{1}{4}$  of the NW $\frac{1}{4}$  and the E $\frac{1}{2}$  of the SW $\frac{1}{4}$  of Section 10 same township and range. I didn't sign that mortgage with that last part added. That is my signature at the bottom of the mortgage. At the time I signed it I signed a note for \$4000. The date of it is April 1st, 1912, and is due 1912. It was dated June 12, 1910, due April 1st, 1912. I know nothing about the note attached to the paper for \$16000 unsigned. When the mortgage was given it covered 40 acres.

COURT: Is that one of the mortgages claimed to have been deposited for security on these bonds?

MR. WILLIAMS: Yes, we expect to connect that up later.

COURT: At the time the transaction was had with the Tobeys.

MR. WILLIAMS: Yes.

The first I know of the additional 160 acres *insert* in the mortgage was at the trial of the Columbia River Orchards Company here about five months ago.

COURT: What do you mean, the Biehl case?



(Testimony of F. C. Koppen.)

A. The Biehl case, yes.

COURT: Heard in this court?

A. Yes, sir.

Mortgage was introduced in evidence, marked "Plaintiffs' Exhibit 24," over the objection of Mr. Wood, that it is irrelevant, and immaterial.

Question by the Court: Well, how much of the land could be irrigated north of the ditch?

A. None at all.

Q. None north and west?

A. No, all between the ditch and the river.

COURT: All the lands that can be irrigated by the ditch are between the ditch and the river.

Court adjourned until 2 P. M.

May 14, 1913, 2 P. M.

A certified copy of the trust agreement between the Columbia River Orchard Company, and the Oregon and Washington Trust Company, from the records of Grant County, Washington, was introduced in evidence, over objection to it, as irrelevant and immaterial, marked "Plaintiff's Exhibit 25".

A certified copy of agreement entered into between the Columbia River Orchard Company and the Oregon and Washington Trust Company, containing in fact, the trust agreement between the Columbia River Orchard Company, and the Washington Trust Company, dated January 31, 1911, was admitted in evidence over the same objection, marked "Plaintiff's Exhibit 26".

[Testimony of Oscar G. Heaton, for the  
Plaintiffs.]

OSCAR G. HEATON, a witness called on behalf of plaintiffs, being first duly sworn testified as follows:

(Questions by Mr. WILLIAMS.)

I reside in Seattle, Washington, have resided in Seattle, about seven years, occupation, attorney at law. Have been practicing law since 1894 Have been practicing in Seattle, since, I went there. My age is 42. I was acquainted with W. E. DeLarm and A. J. Biehl, E. C. Kilbourne and C. A. Kilbourne. Have known DeLarm and Biehl, since sometime the latter part of 1910. I have known Dr. Kilbourne, by sight for some years, but I was in Californis 10 years, and I didn't see him of course during that time. I knew him by sight before that, but have known him since. I had something to do with the Columbia River Orchard bonds during the first four months of the year 1911.

I was familiar with the status of the value of these bonds in the market, and have heard they were being traded. I think there were few, if any sales for cash, They sold for possibly two bits, not over that. I knew something about them in the month of March 19. I think the same answer would apply to the sale of the bonds at that date. After that during the year 1911, they sold for 10c and down as low as 3c In the latter part of 1911, they were brought out thru brokers *a* peddled around all over town.

(Testimony of Oscar G. Heaton.)

There were innumerable trades being made. They were being offered very freely by brokers for almost any consideration, principally in trade.

At different times I saw the bonds. I know the office of the Mullen Land Company, on Third Avenue. They handled them, they handled a great many of them. They displayed at one time a large number of bonds in their window which was facing the public street, that was during the summer of 1911.

I know of the Columbia River Orchard Company, my first dealings with them were along about the first of April. I looked up their general financial repute. The investigations covered the previous two or three months. They had no credit. At one time they were about to be ejected for non-payment of office rent, that was I think the months of December, January and February, that was about the first of April 1911. I think the rent covered those months.

I brought several actions against them for different clients. I brought one action for Mr. Hawkinson, who afterwards transferred the bonds to me. I intervened in the case of Taylor v. The Columbia River Orchards Company. There were pending at that time two or three actions against them, in one of which judgment had been entered and return of nulla bona made by the sheriff. There were two suits in 1910, two or three and four or five at the beginning of 1911.

We have a publication there, known as the Seattle

(Testimony of Oscar G. Heaton.)

Daily Bulletin, it is the official city paper, and also publishes all the court records of the various courts, and all of the auditor's records and every proceeding is shown in this paper, every order that was made and the commencement of every original action and every judgment. I know of my own knowledge that these various suits against the Columbia River Orchard Company were published in this bulletin.

A receiver was appointed in the case of J. D. Taylor vs. The Columbia River Orchard Company; that appointment was made in March, sometime, 1911.

A certified copy of the record in that suit was introduced in evidence over objection as to being irrelevant and immaterial, marked Plaintiff's Exhibit 27.

I brought one action against them myself. That was on six of the 1910 issue, which bore 8 per cent, the interest payable semi annually. The interest was delinquent more than ninety days, and I elected to declare the whole amount due, and sued them for the whole amount face and interest of the bonds. The suit was settled about seven days after it was commenced. I was the attorney for Mr. Steeley, in the case of Steeley vs. Columbia River Orchard Company. That was some kind of an action brought, I think, on the 12th day of May. The interest became delinquent on the 1st of May, 1911.



(Testimony of Oscar G. Heaton.)

Certified copy of the case of William Steeley vs. Columbia River Orchards Company, introduced in evidence over the same objection, marked Plaintiff's Exhibit 28.

Certified copy of the case of the Pacific Coast Fuel and Ice Company vs. the Columbia River Orchards Company, introduced in evidence, over same objection, marked Plaintiff's Exhibit 29.

Certified copy of the record case of John C. Kendal vs. Columbia River Orchard Company, introduced in evidence over same objection, marked Plaintiff's Exhibit 30.

A case may commence with the filing of the complaint or the service of summons. It is necessary to file the complaint at the time the first motion is heard or at the time default is entered, if there is no appearance.

Certified copy of the case of Carl D. Halls vs. Columbia River Orchard Company, introduced in evidence, marked "Plaintiff's Exhibit 31.

I was appointed receiver in the Kendall case. I think in that case I qualified, but the order was rescinded almost immediately on some showing from the other side or some request from the other side, and I never did anything. I didn't know of any property, or take any in to possession.

In the case of Fred Johnson, vs. Columbia River Orchard Company, I had a receiver appointed late in 1911, or early in 1912. The receiver was Harry

(Testimony of Oscar G. Heaton.)

E. Wilson, he resides now in Olympia Washington. That was very widely advertised or written up because immediately after that the Company went into bankruptcy. That was the commencement of the advertising throughout the northwest in regard to the affairs of the Columbia River Orchard Company.

Frank E. Green, was their attorney, in that action, and in several of these actions. He stated that he would let me take the receiver if they didn't settle in a certain time. They didn't do so, and we had a receiver appointed. Mr. Wilson came to Portland, to see what securities he could find, and I believe he took a list of the securities and he left the securities here, I believe, but took a list of them and brought it back with him.

Q. Now in this case that you had, I will ask you if you had a conversation with Mr. E. C. Kilbourne with respect to it?

A. I did.

Q. When was that?

A. Some time between the first and seventh of April.

Q. Will you state what that conversation was—what year?

A. That was 1911.

Q. State what it was and what brought it about?

MR. WOOD: I object to that as irrelevant and immaterial; after this transaction was closed.

(Testimony of Oscar G. Heaton.)

COURT: Unless it was an admission of some kind.

MR. WILLIAMS: We expect to show that Kilbourne told him in that conversation that he had been paid.

COURT: You may answer.

A. Why, I told him—I think I asked him if he knew the receiver had been appointed. In fact, this Mr. Bolen who was receiver had never been discharged; and he said it was news to him, or something like that, and that they had settled with him; the company had settled with him, and they were going right ahead to put in the plant, and that they would have water in the ditch in ninety days.

Q. State whether or not he said anything about—

MR. WOOD: I object to those leading questions. There has been a great many of them put to this witness.

COURT: Don't lead him, please. State what the conversation was, or what was said.

A. Well, I don't remember all of it. That was in substance what he said. He might have said something about—

MR. WOOD: It is not a question, Mr. Heaton, of what he may have said. We want you to give the best of your memory as to what was said.

A. Of course, it has been two years or more. He said that they had settled, the company had settled with them, and he thought they would be all right now.

(Testimony of Oscar G. Heaton.)

COURT: That was in April, I understand?

A. That was some time the first of April.

COURT: 1911?

A. Yes.

Q. State whether or not you informed him what the basis of your suit was?

A. Yes, sir, yes, I did.

Q. What did you tell him in that respect?

A. That they hadn't paid the interest on these bonds, and that I had reason to believe that they hadn't—there was a good many bonds that they hadn't paid the interest on.

Q. What did he say about that?

A. I believe he said that they paid—he though the interest had all been paid.

That suit was settled by giving me a mortgage on some land in Mason County. This land stood in the name of Howe, William F. Howe, who was their broker. The land was transferred to Godfrey, Godfrey and his wife signed the mortgage. They made an effort to settle after the commencement of the *a* action. They made a tender of the interest. It was made thru Scott I. Wallace and someone else. Scott I. Wallace is one of their brokers. The other one is also a broker. He was handling their bonds.

Cross Examination.

(By Mr. WOOD:)

I returned to Seattle for the practice of law in 1905 or 1906, would not say for sure which, and was



(Testimony of Oscar G. Heaton.)

engaged in the practice of law early in either in 1911 and close of 1910.

Q. What led you as a lawyer to be familiar with the Columbia River Orchard Company's bonds.

A. I wasn't until *these* case came up.

Q. You haven't any general familiarity with other bonds and the bond market in general in Seattle. have you?

A. I have knowledge of specific companies that have been doing business there.

A. That you have some connection with?

A. Well, more especially since that time than before.

Q. What I am trying to get at, is whether this knowledge you have of these bonds, was common knowledge on the street, which every lawyer would have, or which every man in Seattle might be presumed to have, or whether it was a knowledge that came to you in relation to special cases which you handled as an attorney?

A. Every lawyer wouldn't have it, but those who have had actions or had anything to do with the company would know.

Q. This would be something of the nature of a special and private knowledge from the fact that you were handling these cases?

A. Was obtained by investigation, and by having these claims against the company.

Q. Now, when was your first personal contact

(Testimony of Oscar G. Heaton.)

with the DeLarm project and the Orchards Company?

A. Why, it was early in the year.

Q. 1911?

A. Yes, I had—I was representing Mr. Hawkinson.

Q. Mr. Hawkinson?

A. Yes.

Q. Did that result in a suit or action?

A. No, he was the owner of these bonds, and some others. These bonds that he transferred to me.

Q. How many were there in value?

A. I think he had some \$1200. in value that I know of; I don't know that he had any others.

Q. And they were defaulted in their interest?

A. They defaulted in the interest on these bonds.

Q. And you were endeavoring to collect the interest on the whole amount?

A. Well, he was urging me to take some proceedings some time before I did. The way wasn't clear to me, and when I did commence. I declared the whole amount due, and sued for the whole amount.

Q. Was that a suit for a receivership?

A. No, it was my intention to ask for a receiver, and then I discovered that a receiver had been appointed in this Taylor suit, and had never been discharged, so I filed a petition in intervention in that case.

Q. So you went in as an intervenor in the Taylor

(Testimony of Oscar G. Heaton.)

case. Now the Taylor case was finally settled, and the receiver discharged, wasn't it?

A. The receiver was discharged. There was some statement filed at that time to satisfy the court as to their—as to any other indebtedness, but that is not among the files.

Q. What became of the Hawkinson claims?

A. That was dropped because the bonds were transferred to me in the interim.

Q. You proceeded at that time no further?

A. No further in the Hawkinson.

Q. Were you paid your interest?

A. Paid what.

Q. Were you paid anything on those bonds?

A. No, except in the settlement, the final settlement of my claims.

Q. Is that when you got the mortgage?

A. Yes.

Q. That you have just spoken about?

A. Yes.

Q. Was that what was settled?

A. My claim was settled, yes.

Q. About what time of the year was that?

A. Well, that—from the records it was the 7th of April.

Q. As I understand it, you didn't have these records procured.

Q. What do you mean?

(Testimony of Oscar G. Heaton.)

Q. You didn't have these records procured, did you?

A. At the request of counsel, I had them transcribed.

Q. And you brought them with you.

A. No, they were mailed to counsel several days ago.

Q. Well, why wasn't the Taylor suit completed, showing the discharge of the receiver?

A. Doesn't it show that?

Q. No, it stops just short of that.

A. If you will excuse me, I think it does.

Q. Well, I may be mistaken. While you were being examined, I made a hasty look at it.

A. The stipulation reads as follows: Filed on the 8th, signed on the 7th. "It is hereby stipulated between Oscar G. Heaton, plaintiff in intervention, and the defendant, that the claims and demands of said plaintiff against defendant in the complaint herein set forth, are fully satisfied and discharged, and said action, so far as this plaintiff is concerned, may be dismissed."

Q. Yes, but meanwhile you had intervened, and there is no showing there that the receiver was ever discharged by the Court, as far as I can find.

A. Well, the order discharging the receiver followed that. If it wasn't there, why, it is an oversight.

Q. Well, it will be sufficient if you can testify that he was discharged following this stipulation



(Testimony of Oscar G. Heaton.)

A. Following that stipulation, and a statement filed, showing or purporting to show that they owed no debts in excess of a very small amount.

Q. Now, the next case in which there was a receiver appointed was this Kendall case, was it?

A. The Kendall case was pending all this time, but the receiver was not appointed until some time later.

Q. Was the Kendall case one of your cases?

A. No, it was brought by Mr. Cassius E. Gates, of Seattle.

Q. Do you know why they didn't have a receiver appointed when they first brought it—waited until after this other matter was settled?

A. I think he made an application soon after he brought it, and I think I know—I don't know as the records shows *ut*, but I know that payments were being made; that was the reason it was continued from time to time.

Q. What was the final disposition of the Kendall case?

A. The case is pending now. At least it was never fully settled.

Q. Well, I notice that there is an application in which the attorneys joined, for the *fischarge* of the receiver, and the dismissal of the receivership.

A. I am not personally familiar with what occurred after I resigned as receiver, but the records show that another receiver by the name of Glen Met-

(Testimony of Oscar G. Heaton.)

zer was appointed, and that he did, or apparently did, a great deal of work, and never got any money for it, and finally got a judgment against the intervenor, Mrs. Teer, and was allowed \$400. for his fees and expenses, and that he finally collected it just a few days ago from Mrs. Teer.

Q. Well, as far as the records here show, it shows that all the attorneys joined in an application for his discharge.

A. I don't know whether some one had been substituted in Mr. Gates place or not at that time.

Q. It says Gates is withdrawn on behalf of the plaintiff Kendall and William Totten, attorney for Emily T. Teer, on whose intervening petition, the receiver was appointed; it shows George A. Custer is attorney of record, and it goes on and shows that they asked for the discharge.

A. That may be.

Q. Your connection with this particular suit was that you were the first receiver appointed—is that it?

A. Yes sir, I happened to be sitting in the courtroom at the time the application was made, and the attorney suggested my name.

Q. And you resigned?

A. Well, some time afterwards. I didn't really do anything as receiver, because I thought there was no property.

Q. Now, this Steeley case—you had nothing to do with that as attorney, did you?

(Testimony of Oscar G. Heaton.)

A. Yes, I was attorney of record.

Q. You were attorney of record for the plaintiffs?

A. Yes.

Q. And how did that case come about?

A. The same way as a money matter.

Q. Was it a suit on bonds?

A. Yes, sir.

Q. For defaulted interest?

A. The interest on these bonds became due on the first of May. I think the first coupons had been cut when he traded for them and so he didn't have them; when the interest came due in May, I mailed the coupons through the bank in Portland, to the Trust Company in Portland. They were returned with the endorsement on the back of the coupon "See DeLarm & Biehl, Empire Bldg., Seattle."

Q. When was that that you mailed your application with the coupons

A. About the 30th of April.

Q. Well, this summons appears to have been filed May 16th.

A. That action I think you will find was commenced on the 12th by serving the summons and complaint.

Q. On the 12th day of May, 1911.

A. The 12th of May.

Q. I am not familiar with enough your practice, but the filing mark was May 16th. You commenced before that time, did you?

(Testimony of Oscar G. Heaton.)

A. By service of summons, and I think at the same time an application for a receiver on an order to show cause why a receiver should not be appointed.

Q. What became of that suit finally?

A. That was settled.

Q. Who settled it?

A. Settled through Mr. Edgar J. Wright, who was the attorney representing them.

Q. That represented some \$1600, did it?

A. Yes, sir.

Q. And have you anything to do with this other. the Pacific Coast Fuel & Ise Company?

A. No, sir.

Q. Do you know anything about that action, that suit?

A. I am—is Mr. Snyder the attorney of record in that action?

Q. Yes.

A. I may have talked with him about it, but I don't know much about it except what the records show.

Q. It seems to be a suit for the care of personal property. Is that what it was?

A. I think it was an adjuster's lien, foreclosure of, lien.

Q. Small sum, about \$150. or something of that kind?

A. Yes, sir.

Q. That was paid, wasn't it?



(Testimony of Oscar G. Heaton.)

A. No, it was satisfied by the sale of property.

Q. Now, were you connected with any other suits against this company than those we have spoken of?

A. I think I have mentioned them all—the case of Johnson v. The Columbia River Orchard Company.

Q. Was that the last one?

A. That was the last one I filed.

Q. When they went into bankruptcy?

A. Yes, sir.

Q. And that was along late in 1911 or the early part of 1912, wasn't it?

A. Yes, the action was commenced in July; early in July I made a trip to Portland here to find out what I could about the bonds. I saw Mr. Brazell at that time.

Q. The attorney?

A. Yes, that is the time he speaks of; Mr. Hodges being away and giving him the key. I didn't really get any information at all, except that I made a copy of that list of securities.

Q. Well, were you the attorney of record in that suit?

A. Yes, sir.

Q. Who was Mr. Johnson?

A. A client of mine.

Q. I know, but a resident of Seattle?

A. Yes, sir.

Q. What was his business?

(Testimony of Oscar G. Heaton.)

A. He was a carpenter.

Q. How did he get these bonds?

A. Traded for them.

Q. How many were there in value, par, face value?

A. \$1800.

Q. \$1500?

A. \$1800.

Q. \$1800?

A. No, it seems to me it was more than that. We were settling on a basis of \$1800.

Q. Who was Mr. Wilson?

A. He was an attorney of Seattle.

Q. What did he have to do with it?

A. Nothing, I guess, until his appointment as receiver.

Q. You said something about his coming over here to Portland did you?

A. Yes.

Q. Was that to get hold of the securities?

A. Yes, that was immediately after his appointment.

Q. Were you his attorney—the receiver's attorney?

A. No, sir, he didn't have an attorney.

Q. You didn't come with him to Portland?

A. No, sir.

Q. Then I suppose all you know about that trip is that he told you he had come.

(Testimony of Oscar G. Heaton.)

A. Yes, that is practically all I know about it.

Q. That would be hearsay. Well, now, what other litigations against the Orchards Company or any of these people were you associated with?

A. I think that is all that is shown in the record here.

Q. That is all that is shown here, but I mean is that all in fact?

A. I think so.

Q. You never made any other efforts to collect any sums from them?

A. No, sir.

Q. Were you ever the owner of any bonds yourself other than this first lot that we have spoken of that were assigned to you?

A. No, sir, except I had one given to me.

Q. What?

A. I had one given to me in 1911.

Q. Now, when you speak of the market value of the bonds, were they listed on the Exchange over there, and did they have a regular quotation and market value?

A. No, they never listed them; they had no value.

Q. As a matter of fact, they were only traded specially here and there in particular places. There wasn't any general dealing in them, as you would deal in securities, was there?

A. Well, it became so general that they—all these agents would carry ads in the paper offering them

(Testimony of Oscar G. Heaton.)

Q. Now, what agents? You have only spoken, I think of two.

A. This list of holders that is shown in—I think in the Taylor case; list of parties who ask permission to intervene in that action, or that if the Steely case *em* rather.

Q. Well, that was at what time in the year? That was along getting toward the summer of 1911, wasn't it?

A. Yes.

Q. Do you know anything about the bonds yourself prior to March, 1911?

A. No, except I had talked with Mr. Biehl prior to that time.

Q. Well, he would give them a good standing, wouldn't he?

A. He did, yes.

Q. You knew the Washington Trust and Savings Company over there that amalgamated with Dexter Horton?

A. Yes.

Q. Now, that is a first class company, isn't it?

A. Yes, sir.

Q. And it was trustee?

A. It was under the old management.

Q. Under the old management?

A. Yes.

Q. Now, while it was acting as trustee, didn't those bonds have a good name over in Seattle?



(Testimony of Oscar G. Heaton.)

A. I don't know much about it. I formed my own conclusions after the talk with Mr. Schram.

Q. What time was that?

A. That was early in the fall.

Q. After you talked with whom?

A. Mr. Schram.

Q. Who was he?

A. Mr. Schram, the president of the old company

Q. Of the old Washington Savings & Trust Company?

A. Yes, sir.

Q. Well, they as a matter of fact, resigned?

A. I believe so.

Q. But, as far as the general public was concerned: if you know, as long as they stood as trustee, didn't the general public look upon these bonds as good?

A. Why, I think the fact that they were trustee had something to do with the project getting as far as it did, or going as well as it did.

Q. Did you ever know yourself, along in the latter part of 1910, or in that period, of any of those bonds being sold or exchanged at par?

A. Yes, sir.

Q. Now, as a matter of fact, Mr. Heaton, about the time that this trust company, the Washington Savings & Trust Company resigned, and about that time March, 1911, these bonds started on the decline, and they went swiftly and more rapidly as it was evident the people were in deep water until it was evi-

(Testimony of Oscar G. Heaton.)

dent they had little or no value, and it took them until about the end of the year to finish up. Isn't that the fact?

A. I think that is the fact, yes sir.

Q. You testified about talking with Mr. Kilbourne. I am not sure that it has been clearly differentiated. There are two Kilbournes. I think you said you knew them both.

A. Mr. E. C. Kilbourne, I think.

Q. You were talking exclusively of Mr. E. C. Kilbourne?

A. Yes, sir.

Q. Have you had an intimate acquaintance with them, or casual? acquaintance, or business acquaintance, or what is the nature of your acquaintance?

A. Not intimate acquaintance; a casual business acquaintance.

Q. When you talked with E. C. Kilbourne, early in April, he expressed surprise that the interest hadn't been paid, did he?

A. I believe he did.

Q. And said that they had been paid, and were going to complete the work, or something of that kind, expected to have water on it?

A. Would have water in the ditch in 90 days.

Q. Did he indicate to you that he thought—that he was under the impression that the bonds were good?

A. He carried that impression, yes.

(Testimony of Oscar G. Heaton.)

Redirect Examination.

(Questions by Mr. WOODCOCK.)

Was the matter of the bonds discussed between you and Kilbourne at that time, the value of them?

A. I think it was.

Q. How did it come about?

A. How is that?

Q. How did the conversation come about?

A. Well, I told him that I had some bonds that they hadn't paid the interest on, and that I felt sure there were others.

Q. He thought the bonds were all right; that is the way you remember the impression he made on you.

A. Yes, he seemed to carry that.

Q. Was suggested to you?

MR. WOOD: That is leading.

COURT: Don't lead him.

MR. WOOD: You put something in witness' mouth he never said. It is worse than leading.

Q. Well, what did he say about that? I guess that's right.

A. He said the bonds would be all right, just as soon as they got the water on the property; it all depended on that.

Q. Now, you testified in cross examination, in reference to having a conversation with—what was his name—Mr. Schram. What did he inform you about the situation?

A. Well, he said in general terms what was re-

(Testimony of Oscar G. Heaton.)

quired before any bonds were issued; that they must deposit with the company \$125. for every \$100. of bonds issued, and he didn't show me the securities but I understood they were first mortgages, and I was quite favorably impressed with the thing at that time, but I soon discovered - - -

Q. What was the date of that?

A. Well, that was—that was early in the year.

Q. Of 1911?

A. Yes.

Q. Now, you say you soon discovered. What did you discover?

A. I discovered that this company was being used as a cat's paw; they were simply depositing with them any kind of security, and that the trust was not being properly carried out.

Q. When did you discover that?

A. Well, shortly before I intervened in this case in May.

Q. In your testimony in chief, I asked permission to make one question a little more definite. When Mr. E. C. Kilbourne talked with you, and he said "they," did you understand or was anything said about who was meant by "They"?

A. Well, I knew that their company had contracted for putting in the pumping plant.

Q. Did you know who constituted the company?

A. No, I do not; it was Kilbourne—it was formerly the Kilbourne-Clarke Company.



(Testimony of Oscar G. Heaton.)

Q. When did you demand your interest?

A. In my own case?

Q. Yes.

A. Oh, some time prior to intervening; a long time oh, it was probably in March.

Q. March, 1911?

A. Yes.

Q. Where did you go to demand your interest?

A. I don't remember just what I did, but I made demand several places. I tried to see Mr. Biehl, and Mr. DeLarm personally. It was pretty hard to see them. I made demand at the Office I think.

Q. I will ask permission to ask a leading question Did you go to the Washington Trust Company to demand your interest—who was supposed to be the trustee, for the outfit at that time?

A. I think I did, and was informed that *the* had—that they were no longer trustee.

Q. That was after they resigned?

A. Yes, they hadn't—I learned subsequently they hadn't been discharged.

Q. Well, I will ask you what the fact is as to making your various demand of the people that you had gone to, whether you secured any money at all on your bonds? Either for interest or otherwise?

A. Not a cent.

Q. Did you secure any money at all?

A. Oh, in the final settlement?

Q. Yes.

(Testimony of Oscar G. Heaton.)

A. Yes, they paid the interest in cash and the costs, and gave me a mortgage for \$600. which was the face of the bonds on this monition.

Q. Then you surrendered up the bonds?

A. I surrendered the bonds.

Recross Examination.

(Questions by Mr. WOOD.)

You knew that the Kilbournes were the contracting engineers for putting in the pumping plant, did you?

A. Yes, the Kilbourne-Clarke Company, or the Kilbournes personally.

Q. When was it you had this talk with Schram?

Q. Well, it was early in January, to the best of my recollection.

Q. Of 1911?

A. Yes, sir.

Q. You said that you were favorably impressed with his talk, but afterwards you had reason to believe—came to the belief that they were being used as a cat's paw. Now, what was it that led you to that belief?

A. Why, when—I got from them or my attorney Mr. Hammond, got from the Trust Company, a copy of the securities which had been filed at that time, consisting of either four or five land contracts and water mortgages, some of each, and after looking those over, I was convinced that there was no value there, no substantial backing because the mortgages

(Testimony of Oscar G. Heaton.)

were \$16,000. on each quarter section, and nothing to show that the title was in the parties; the title was in the Government; as far as we could discover. There was no abstracts filed with the Trust Company, and no opinion as to title.

Q. Now, if I remember correctly, you said that it was this conclusion that led you to intervene in the Taylor case; was that right?

A. No, I was sparring along there. I didn't know just what to do until I discovered this receiver had been appointed in the Taylor case and never discharged.

Q. I was trying to get at the date a little bit. I only want first to know whether I was right in saying that your discovery of what you thought were the insufficient securities led you to intervene in the Taylor case.

A. Well, Mr. Hawkinson had been after me for some time to do something to bring an action of some kind to get things started. He used to come to my house every morning before breakfast.

Q. Could you indicate from your independent memory, when it was you got this list of securities, examined them, and came to the conclusion that they were in bad shape. I want to get the time and date, approximately.

A. Well, I think that was - - -

Q. For example, I don't want to interrupt you,

(Testimony of Oscar G. Heaton.)

but for example, would it be before or after your Taylor intervention?

A. I think it was just about the time I intervened. It might have been immediately after.

Q. It was not that, then, that really was the animating cause that induced you to intervene?

A. No, they were delinquent. If I had followed my instructions, I would have brought an independent action early in March, but I didn't do it.

Q. But you think now, as nearly as you can place it by independent recollection, that you got these securities, and *came* to this conclusion about the time you intervened. Might have been a little before or a little after; is that right?

A. That is probably the first time that I obtained a definite information as to what securities were behind the bonds.

Q. Yes, but I want to get now the date of that?

A. That was about the first of April.

[Testimony of Pearl M. Day, for the Plaintiffs.]

PEARL M. DAY, witness called on behalf of plaintiffs, being first duly sworn testified.

I reside at 472 Yamhill Street, Portland, Oregon. Lived in Portland, three years, occupation stenographer and bookkeeper. Was acquainted with George C. Hodges, worked for the Oregon and Washington Trust Company in 1911. Commenced working for them the 1st of March, 1911, continued until



(Testimony of Pearl M. Day.)

about the last of February 1912. My duties in the office were stenographer. I did a little clerical work. They kept some books in the office. They had a ledger, and the books of the Puget Sound Realty Company, and the Oregon and Washington Trust Company. Mr. Hodges, was running the Puget Sound Realty Company, was engaged in exchange in real estate business. Other books kept in the office, just had a sort of memorandum book.

A book was handed the witness and she identified it as one of the books kept in the office of the Oregon and Washington Trust Company, book marked "Journal." Mr. Hodges kept the book. I did the writing in it. I wrote the page marked "List of Water Mortgages," and the pages marked "Sales Contracts." I wrote the top part in this page, marked "Bellingham Development Company's Bonds." I don't know who wrote the bottom part. The list headed "List of Water Mortgages was made by Mr. Hodges. Mr. Hodges would call off and I would write them down. Wrote down the names and amounts he called off from the water mortgages that he had. Had them there in the office I saw them. I think that was written in July 1911, June or July.

Witness was handed a jacket marked "Jennie C Koppen Water Mortgage, \$16,000. No. 7," and identified it as one of the mortgages in possession of the Oregon and Washington Trust Company. There were two Jennie C. Koppen mortgages.

(Testimony of Pearl M. Day.)

Witness was handed a jacket marked "No. 12 Eli Montgomery Water Mortgage, \$16,000.," and identified as *on* Mr. Hodges had in checking the mortgages.

Witness was handed an envelope marked "No. 8 Mary A. Domay, water mortgage \$20,000.," and identified as one in the list, and also an envelope No. 9, W. S. Webber, Water Mortgage \$16,000. and identified as one in the list.

Also one marked No. 11, James Perry, Water Mortgage \$8,000. and identified as one in the list.

One marked No. 6, William E. Stickles, Water Mortgage, \$16,000. and identified as one in the list.

Also an envelope marked No. 2, Virgil H. Robinson, water mortgage \$16,000. and identified as one Mr. Hodges had.

Also one marked No. 1, Emil Cords, water mortgage \$16,000. and identified as one that Mr. Hodges had.

MR. WOOD: Let me make a suggestion. It is evident that this young lady is tallying with the book. Now, if you are satisfied that book is right, you can put them in in that way. As far as I am concerned. I will consent to it.

MR. WOOD: I just wanted to expedite. She pulls each one out of the envelope and compares with the book, I don't object to it at all; I dare say it is all right. I was only trying to shorten it.

Witness identified a whole bunch of envelopes con-

(Testimony of Pearl M. Day.)

taining water mortgages as ones in Hodges possession.

Q. For what purpose, did Mr. Hodges have these mortgages?

A. As I understood, they were to guarantee the bonds back of the bonds.

Certified copy of Desert Land Mortgage, Jennie C Koppen, to Columbia River Orchard Company, introduced in evidence marked plaintiffs' exhibit 32.

Also a certified copy of mortgage of William E. Stickel to the Columbia River Orchard Company, marked "Plaintiffs' Exhibit 33."

Certified copy of James Perry mortgage to the Columbia River Orchards Company marked "Plaintiffs Exhibit 34."

MR. ERSKINE WOOD: These all go in under our same objection.

COURT: They are not duplicates of any offered heretofore?

MR. WILLIAMS: No, they are not duplicates at all.

To shorten, your Honor, is no objection to that method, we would like to simply read the description of the land and the date of five of these mortgages into the records.

COURT: They are on this list?

MR. WILLIAMS: They are on this list that Miss Day has just identified.

(Testimony of Pearl M. Day.)

The water mortgage of Walter S. Webber to the Columbia River Orchards Company, dated January 22, 1910, covering the southeast quarter of Section 24 Township 14 North, Range 25 East, W. M., and the note accompanying it is dated June 1, 1910, given for \$16,000., due June 1, 1912, and signed by William S. Webber and Cora M. Webber. The mortgage is on the same form as the certified copies.

The mortgage of Eli J. Montgomery, to the Columbia River Orchards Company, covering Desert Land Entry No. 1545, covering the northwest quarter of section 34, Township 14, North, Range 25 East Willamette Meridian, in Grant County, Washington, on the same form as the certified copy of the water mortgages already offered in evidence. The note is dated September 15, 1909, due April 1, 1911.

Water mortgage given by G. J. Heuver, dated the 7th day of August, 1911, covering the southeast quarter of Section 20, Township 15 North, Range 27 East W. M. in Grant County, Washington; note due *April* 1, 1916, \$16,000. This mortgage is Washington Orchard Irrigation and Fruit Company and is headed "Water Mortgage Contract."

The water mortgage of Geo. Holtzner, covering desert entry made in the United States Land Office on the southwest quarter of Section 34, Township 15 South, Range 25 East, Willamette Meridian, in Grant County, Washington, note dated August 11, 1911, due April 1, 1916, for \$16,000.



(Testimony of Pearl M. Day.)

Also water mortgage contract running to the Washington Orchard Irrigation and Fruit Company, by Charles Rex Curtis, covering a homestead entry made in the United States Land Office at North Yakima, Washington, the 21st day of August, 1911, on the southwest quarter of Section 32, Township 15 North, Range 28 East W. M. Note dated October 11, 1911, due April 15, 1915, for \$16,000. signed by Charles Rex. Curtis.

Also water mortgage made to the Washington Orchard Irrigation and Fruit Company by Mary E. Greenwell, covering a desert land entry made in the United States Land Office at North Yakima, Washington, on the 26th day of June, 1911, on the northeast quarter and the southeast quarter of the northwest quarter, Section 32, Township 14 North, of Range 25 East, W. M., in Grant County, State of Washington. Note dated July 12, 1911, for \$20,000. due April 15, 1915, and signed by Mary E. Greenwell

Also water mortgage running to the Washington Orchard Irrigation and Fruit Company made by Allison H. Ward, on patented land, southeast quarter of Section 26, Township 15 North, Range 26 East, W. M., in Grant County, Washington, and note dated July 30, 1911, due August 1, nineteen-something being scratched out, for \$16,000. signed by Allison W Ward and Alice G. Ward, and on the note in writing "This note is given in accordance with the terms of a water mortgage contract executed July 30, 1911.

(Testimony of Pearl M. Day.)

Water mortgage contract running to the Washington Orchard Irrigation and Fruit Company from Albert Blum, covering homestead entry and D. E. entry, the 20th day of September 1906, and marked "U. S. Patents," covering the northeast quarter and the east half of the southeast quarter of Section 32, Township 15-25, note dated July 12, 1911, due April 15, 1915, for \$24,000. Signed Albert Blum.

COURT: Those are not on the list, I understand.

MR. BRYSON: There are fifteen mortgages that are not on the list. These are fifteen that Mr. Koppen had.

MR. WILLIAMS: Oh, I didn't know that.

MR. ERSKINE WOOD: I understood you were reading from those she had identified.

MR. WILLIAMS: I will finish reading these and connect them up later.

MR. FLEGLER: I understand these were all taken after this transaction.

MR. WILLIAMS: Yes, I will connect this up with Mr. Koppen. I will finish the list so as to connect them.

Also water mortgage contract made to the Washington Orchard Irrigation and Fruit Company by Easton A. Rose, covering a desert land entry, the northwest quarter of Section 34, Township 15 North, Range 25 East, Willamette Meridian, in Grant County, Washington, and note dated July 12, 1911, for 16,000, due on or before April 1, 1915.

(Testimony of Pearl M. Day.)

Also water mortgage contract, dated August 9, 1911, to the Washington Orchard Irrigation and Fruit Company of John Demert, covering homestead entry to the southeast quarter<sup>l</sup>—with a dash after it, Section 30, Township 28, North Range 28 East, W. M., containing 188 more or less acres in Grant County, Washington, with note dated August 9, 1911, due April 1, 1916, for \$18,000.

Also water mortgage dated the 12th day of July, 1911, running to the Washington Orchard Irrigation and Fruit Company, of William M. Hunter, covering homestead entry the 24th of September 1907, on the southwest quarter of the southwest quarter (original H. E.) made September 24, 1907, and the north half of the southwest (additional H. E.) made June 26, 1911, with a note dated July 12, 1911, for \$16,000. due April 1, 1915, signed by Dr. William Hunter and Mrs. William Hunter.

Also Water mortgage contract by Lee Richmond and Nellie Richmond to the Washington Orchard Irrigation and Fruit Company, covering the north half of the north half of Section 2, Township 13 North, Range 25 East, W. M., in Grant County, Washington. Doesn't appear to be any note with the mortgage.

On this mortgage of William Hunter is a notation in pencil opposite the description "32-14-25."

Also water mortgage made on the 11th day of August, 1911, to the Washington Orchard Irrigation

(Testimony of Pearl M. Day.)

and Fruit Company, of George Holtzner, on the southeast quarter of Section 34, Township 15 North, Range 25 East, W. M., in Grant County, Washington, with a note dated August 11, 1911, due April 1, 1916, for \$16,000.

Also water mortgage given to the Washington Orchard Irrigation and Fruit Company by Nelson Litchfield, covering Desert Entry made the 6th day of January, 1911, on the southwest quarter of Section 26, Township 15 North, Range 26 East, W. M., with a note dated August 11, 1911, for \$16,000. due April 1, 1916, signed Nelson Litchfield.

Also a water mortgage dated the 25th day of July, 1911, to the Washington Orchard Irrigation and Fruit Company by F. H. Heipp, covering the northeast quarter of Section 20, Township 15 North, Range 26 East, W. M., in Grant County, Washington, with a note dated July 25, 1911, due April 2, 1916. for \$16,000., signed F. H. Heipp.

Also a water mortgage running to the Washington Orchard Irrigation and Fruit Company, of Thomas L. Rydberg, covering the west half of the southeast quarter of Section 32, Township 15 North, Range 25 East, W. M., with a note dated August 8, 1911, for \$8,000. due April 1, 1916, signed John L. Rydberg.

Also a water mortgage running to the Washington Orchard Irrigation and Fruit Company of W. A. Joyce, covering the northeast quarter of Section



(Testimony of Pearl M. Day.)

28, Township 15 North, Range 26 East, W. M., Grant County, Washington, with a note dated July 25, 1911, due April 1, 1916, for \$16,000. signed by W. A. Joyce.

Also a water mortgage running to the Washington Orchard Irrigation and Fruit Company of Tobias K. Skaar, on the southwest quarter of Section 20, Township 15 North, Range 27 East, with a note of August 14, 1911, due April 1, 1916, for \$16,000, signed Tobias Skaar.

Also a water mortgage contract of Mary A. Tucker, running to the Washington Orchard Irrigation and Fruit Company, dated the 30th day of July, 1911, on the southeast quarter of Section 2, Township 14 North, Range 24 East, W. M., with note dated July 31, 1911, due April 1, 1915, for \$16,000. signed Mrs. Mary Tucker.

Also Desert Land Mortgage, dated April 19, 1910, signed by Adolph Lindauer, covering the northwest quarter of the southwest quarter, and the south half of the southwest quarter, and the southwest quarter of the southeast quarter of Section 30, Township 14 North, Range 26 East, W. M., in Grant County, Washington, with a notation that water shall be put upon the land on or before the 15th day of July, 1911. This mortgage has not been acknowledged. With a note purporting to be signed by Adolph Lindauer, dated April 1910, due May 15, 1911, for \$16,000.

(Testimony of Pearl M. Day.)

These mortgages all being in the same form as the certified copies in the record.

Q. At the time that you listed those, Miss Day, did you list all of the mortgages that there were in the office?

A. I listed only as Mr. Hodges called them off to me. I don't know of course, any more than what he gave me.

Q. Examine the book that you have testified about, on the page headed "Real Estate Mortgages," and state if you know who wrote that page?

A. This seems to be my writing, I couldn't identify the figures.

Q. The writing is yours?

A. I think it is mine.

Q. What did that mortgage of \$1,000,000. refer to? Was there a mortgage of that kind in the record, or in the office at that time?

A. Well, I have heard them speak about a mortgage, a million dollar mortgage; I don't remember now just what it was.

Q. Was there also one there of \$5,000,000?

A. I don't recollect their speaking about it.

Q. By whose directions did you make these entries in this book?

A. Mr. Hodges.

MR. WILLIAMS: We offer in evidence a certified copy of mortgage for a million dollars, given by the Washington Orchard Irrigation and Fruit Com-

(Testimony of Pearl M. Day.)

pany, to the Oregon and Washington Trust Company, dated the 15th day of March, 1911, and recorded in the records of Grant County, Washington, on February 3, 1912.

MR. ERSKINE WOOD: No objection to a copy, but irrelevant and immaterial.

Marked "Plaintiffs' Exhibit 35."

The witness was handed a mortgage purporting to be for \$5,750,000., and the signature of W. E. DeLarm, was identified by the witness, and marked for identification, "Plaintiffs' Exhibit 36."

A book marked "Journal," containing a list of the mortgages and sales contracts identified by the witness was introduced in evidence over the objection as irrelevant and immaterial, marked "Plaintiffs' Exhibit 37."

Q. Miss Day, were you an officer at one time of the Oregon and Washington Trust Company?

A. Yes.

Q. Did you have any financial interest in the company?

A. No.

Q. At whose request did you become an officer of the company?

A. Mr. Biehl's.

Q. What position did you occupy with that company?

A. Why I was secretary of the board of directors.

(Testimony of Pearl M. Day.)

Q. Did the board of directors ever have a meeting?

A. No. I was sent over to the Yeon Building to one of the meetings, but when I got there, they were all gone.

Q. How many offices did Mr. Hodges have? How many rooms in his office?

A. Three.

Q. How were they arranged?

A. There was a reception room, and then two offices off from that.

Q. What connection did H. H. Humphrey have with the Oregon and Washington Trust Company?

A. Well, I really don't know what his connections were.

Q. Was he there at the office?

A. He was there—when I first went there, he was there about two or three months, and he was doing practically the same thing that Mr. Hodges was doing.

Q. When did Mr. Hodges leave Portland, if he did leave?

A. In September, 1911.

Q. Who took his place?

A. Mr. Biehl.

Q. You may state whether or not they had any abstracts in the office there, real estate abstracts, abstracts of real estate covering these mortgages that they had?



(Testimony of Pearl M. Day.)

A. I don't—not that I know of. I don't know whether they did or not.

Q. Do you know whether they kept a statement of the bonds that were certified to by the Oregon and Washington Trust Company?

A. No, I don't believe they did.

Q. You saw a great many bonds there, didn't you?

A. I saw a number of bonds, but I didn't keep any record of how many were there.

Q. You were not instructed to keep a record?

A. No.

Q. State whether or not your salary was paid promptly?

A. No, it wasn't.

Q. What was their financial condition during the time that you were with them, as to paying their bills?

A. When Mr. Hodges, was there, he was quite prompt paying them by the 10th of the month.

Q. How was it after Mr. Biehl took charge?

A. Well, the office was sued a couple of times.

Witness identified letter of George C. Hodges, dated March 1, 1911, and introduced in evidence over same objection and marked Plaintiffs' Exhibit 38.

Witness identified letter dated October 26, 1911, signed "Jack," as in the hand writing of Mr. Biehl, introduced in evidence over same objection, marked "Plaintiffs" Exhibit 39.

Q. You may state, Miss Day, what disposition

(Testimony of Pearl M. Day.)

Mr. Hodges was making of the bonds that were sent to him by DeLarm and Biehl, during the time that you were with them?

A. Why, he was giving them in exchange for real estate.

Q. State whether or not they had considerable dealings in bonds being traded for real estate?

A. Yes, they did.

Q. What activity did they show in regard to hunting up trades of real estate for bonds?

A. Why, I was instructed to answer ads in the paper.

Q. What kind of ads?

A. For people wanting to exchange real estate for other securities.

MR. ERSKINE WOOD: May I interrupt here to ask what time this was.

Q. When was this, Miss Day?

A. That was about May or June, 1911.

Q. Did that continue all through the time that you stayed with them?

A. Not so much as it was when I first went there.

Q. When you first went there, there was some activity in that respect?

A. Yes, sir.

Q. Do you know whether the Oregon and Washington Trust Company had a banking account, or not?

A. For a while, I think they carried it at the

(Testimony of Pearl M. Day.)

bank in the Chamber of Commerce, not the Bank of California, but the other one.

MR. ERSKINE WOOD: Hartman & Thompson?

A. Yes, Hartman & Thompson.

Q. How were you paid?

A. By check.

Q. By whom was the check signed?

A. Mr. Hodges.

Q. Individually?

A. Yes.

Q. They were not signed then on behalf of the Oregon and Washington Trust Company?

A. No.

Q. Then the bank account was not the Oregon and Washington Trust bank account?

A. It was at the Hartman Thompson for a very short time, and in the other bank, it was Mr. Hodges' name.

Q. Do you know whether they ever acted as trustee in any other matter than the Columbia River Orchard bonds?

A. They were trying for another company, I don't exactly remember the name of the company now.

Q. Trying to organize another company?

A. Yes, I think it was a lumber—timber deal, timber company.

Q. Would you know the name of the company if you heard it?

A. I think I would.

(Testimony of Pearl M. Day.)

Q. Imperial Timber Company?

A. No.

Q. They never consummated that?

A. No.

One of the sales contracts introduced in evidence marked Plaintiffs' Exhibit 40.

Cross Examination.

(By Mr. ERSKINE WOOD.)

Q. When did you go to work for Hodges?

A. In March, 1911.

Q. And that is when the trading in bonds was most active, or was it most active in June? I didn't understand what you meant?

A. During the period from there to about June.

Q. You went to them the first of March?

A. Yes.

(Questions by Mr. C. E. S. WOOD.)

When did you become a director in that company?

A. After Mr. Biehl took charge of that office.

Q. About what date?

A. I don't remember the date. It was after September.

A. But you never sat in any board meetings.

A. No.

Q. They sent for you once, and then ran away from you?

A. Mr. Biehl told me there was to be a meeting in Mr. Brazell's office at the Yeon Building. When I got there, he said they had all gone.



(Testimony of Pearl M. Day.)

Q. Didn't wait for you. That is the meanest thing I have heard about it.

Witness excused.

MR. BRYSON: Mr. Wood, we will ask you to stipulate that the list of mortgages which were read off by Mr. Williams the mortgage of Virgil H. Robinson, the mortgage of Emil F. Cords, the land contract of F. C. Koppen, the mortgage of Alfred Gagner, mortgage of Laura Wattles, mortgage of Jennie C. Koppen, mortgage of William Stickel, mortgage of James Perry, are identical mortgages with the certified copies which we introduced in evidence.

MR. WOOD: Yes, if you say they are.

### **F. C. Koppen Recalled.**

#### **Cross Examination.**

(By Mr. WILLIAMS.)

Mr. Koppen, did you have a hand in taking a lot of water mortgages for the Washington Orchard Irrigation and Fruit Company?

A. Yes.

Q. In 1911? . A. Yes.

Q. When these mortgages were first taken, were they acknowledged? Were the acknowledgments of the mortgagors taken?

A. No, not right away.

Q. How long was it afterward that they were taken?

A. Oh, I can't say; it was some time, some weeks.

(Testimony of F. C. Koppen.)

Q. I will hand you the water mortgage of Dr. W. M. Hunter, and ask you if that is one of them?

A. Yes, Hunter's is one of them.

Q. Also John Demert, is that one of them?

A. Yes, that is one of them.

Q. And Easton A. Rose?

A. Yes.

Q. And Albert Blum?

A. Yes.

Q. And Mary E. Greenwell?

A. Well, no, I didn't have anything to do with that one, nor Blum. You mean just the mortgage that I secured for them?

Q. Yes, and that you acknowledged?

A. Yes, Yes, all right.

Q. You acknowledged, is that one of them, Mary E. Greenwell?

A. Yes, this is.

Q. And Allison H. Ward?

A. Yes.

Q. And G. J. Heuver?

A. No.

Q. What?

A. No.

Q. You didn't acknowledge that one? Was it among the ones?

A. Yes, he gave it to me to acknowledge. Then I remember that I wasn't there, and I struck out my name.

(Testimony of F. C. Koppen.)

Q. That was among the list that you had at that time, and securing?

A. Yes.

Q. Examine that of Mr. Heuver, and state if that was one of them?

A. No, that is struck out.

Q. Well, was that among the list that you had at that time?

A. Yes, oh, yes.

Q. How many were there of these mortgages you took up there?

A. I think there were fifteen all together.

Q. After you got the acknowledgments of those taken, what did you do with them?

A. That was about the time that we learned of the break-down of the company, and I think we kept them for a few days, not knowing what to do with them, and then some one, Beihl, I think, wrote to me to Portland, to send them there; but as I remember I didn't. I sent them to, I think, the receiver in Seattle.

Q. Mr. Wilson?

A. Mr. Wilson, yes.

Q. Now, you said that Mrs. Koppen sold some land to the Columbia River Orchard Company. What was the consideration for that?

A. She made—she sold twice—no, to the Columbia River Orchards Company—the consideration of

(Testimony of F. C. Koppen.)

that was stock in the Columbia River Orchard Company. That was 80 acres only.

Q. Was that before DeLarm and Biehl got hold of the corporation?

A. Yes.

Q. What did he sell afterwards to them?

A. She sold the rest of that quarter section to the Washington Orchard Irrigation and Fruit Company

Q. What was the consideration of that last sale?

A. It was bonds.

Q. What kind of bonds?

A. They were Washington Fruit and Irrigation Company bonds.

Exhibit 41, discussed with the witness and marked for further identification.

The mortgage of Mary A. Domay, was introduced in evidence and marked "Plaintiffs' Exhibit 42.

Q. Now, there appears in evidence, Mr. Koppen, a certified copy of a water contract given by you to the Columbia River Orchards Company.

A. Yes, I gave one.

Q. Now, where is that land located with reference to the high ridge?

A. It is on the high bench.

COURT: What do you mean by the high bench? Above the rim rock?

A. Yes.

Q. Above the rim rock, not down on the flat?



(Testimony of F. C. Koppen.)

A. No it is above.

Q. Now, these fifteen mortgages that you assisted in taking up there in July and August; and which you acknowledged later, now where are they with reference to this rim rock?

A. They are nearly all—I think they are all up on top of the rim rock.

Q. How far from the water ditch of the Columbia River Orchard Company?

A. All the way from three to ten miles—twelve miles.

Q. You may state, Mr. Koppen, whether or not you had any conversation with Mr. DeLarm, with regard to the securities behind the bonds?

A. Yes, I did.

Q. Did he tell you what the securities were?

A. Yes.

Q. State what he said about them.

A. Well, he said that in the first place they were secured by deeds and first mortgages to the amount of 125 cents on the dollar, and that after that they were further secured by the guarantee of the Washington Fruit and Orchards Company, so that all the property they owned, the pump house and the machinery and the ditches and the land, was additional security to this 125 per cent in the first place. Then later on he told me that the sales contracts were placed with this Washington and Oregon Company, as a sinking fund to pay off these bonds; that was a

(Testimony of F. C. Koppen.)

third security, so that they would, in the course of seven or eight years, be automatically retired.

Q. Did he state to you what lands these land contracts covered?

A. Beg pardon.

Q. Did he state to you what lands these land contracts covered, that were deposited with the Oregon and Washington Trust Company as security for the bonds?

A. No, he didn't definitely, but he gave us to understand that these lands were located in Oregon, Idaho and the Sound country here.

COURT: You mean sales contracts.

Q. I mean sales contracts, the lands that they were selling.

A. Oh, the land that they were selling in Section 20 and Section 16?

Q. Now, did he state what those mortgages covered, that they pretended to have behind the bonds?

A. Yes, he said it was principally farm property, but also city property in Oregon, Idaho and Washington, saw mills and stores, and one thing and another.

Q. You may state whether or not later on you had a conversation with him in regard to these mortgages again, and what he said about it.

A. After he told me the first time?

Q. Yes.

A. That was the time that he told me about the

(Testimony of F. C. Koppen.)

sales contracts being deposited as a sinking fund.

Q. Now, later on in 1911, did you have another conversation with him in regard to these mortgages that were behind the bonds?

A. Oh, yes, we talked about it every time I saw him.

Q. Did he make any different statement to you about the mortgages that were behind the bonds?

A. Eventually he did; when he was asked outright where this property was, he admitted that it was the property at Wahluke that was behind the bonds.

Q. What time of the year was that, Mr. Koppen?

A. Why that was just before, a short time before he went into bankruptcy; late in 1911.

Q. Now state a little more fully what he said about that and what you said.

A. I remember Mrs. Koppen asking him about—asking him outright if this property at Wahluke was the mortgages that he had referred to as being security behind the bonds, and he hesitated a while and finally said yes.

Q. Was anything further said in that conversation about mortgages?

A. Yes, I asked him how many bonds were issued and he said \$300,00—that is \$300,000 I think is what he said, and then I asked him if at any future time *ther* could be more bonds issued on this same security, so as to weaken the security, and he said, no, such a thing couldn't be done; I think he said it

(Testimony of F. C. Koppen.)

would be unlawful, or any way he said it couldn't be done; that on this security that was deposited there could never be any more bonds issued.

Q. When was that conversation?

A. That was at the time that we made the sale to him; this was before the sale was concluded.

Q. Now, I am speaking, Mr. Koppen, about the time that he admitted the water mortgages were the mortgages that were behind the bonds.

A. I think that was some time in - - -

Q. I want you to state a little more fully the conversation that you had at that time with him, if you can.

A. Well, I can't state exactly what we said but it was in the way of the standing of the company at that time, whether he would be able to pull through or not, and as to the security behind the bonds, the value of the bonds, whether they were any good or not, and he maintained all the time that they were good and that he would make them good, but finally we pinned him down to tell us just exactly what the security was and then he admitted that it was the land that he had bought from us, and these water mortgages—were the only things behind the bonds.

Q. Now, how long after that conversation was it, as near as you can tell, that they went into bankruptcy?

A. A month or two.

Q. A month or two.



(Testimony of F. C. Koppen.)

A. It may possibly have been three months, I think not, though.

Q. Was the pumping plant completed at that time?

A. Yes.

Q. All completed?

A. I think so, yes; I think it was.

Q. Machinery all in; switchboards installed and everything of that kind?

A. Yes.

Q. Were the ditches completed?

A. Yes.

Q. Was the intake completed?

A. Yes.

Q. What was the reason they didn't put water on it?

A. Couldn't get the power.

Q. Do you know why they couldn't get the power?

A. Why as I understood it because they didn't have the money to put up, or couldn't show that they would use the power and be able to pay for it if the power company brought the line down to them-- went to that expense.

MR. WOOD: I don't know what value that point is to you but that is perfectly incompetent testimony unless you can show he has some knowledge.

Q. How did you gain this information?

A. Well, from DeLarm principally.

(Testimony of F. C. Koppen.)

Q. Did you talk with Edward C. Kilbourne about it any?

A. About the power to be had?

Q. Yes.

A. I don't recollect. If I did, I don't recollect what was said.

Cross Examniation.

(Questions by Mr. ERSKINE WOOD.)

Mr. Koppen, these water mortgages that you have testified about, did you secure them or merely acknowledge them? Did you secure some?

A. I secured most of them, yes.

Q. You went out among your neighbors?

A. Yes.

Q. And got them?

A. Yes.

Q. When did you do that?

A. I think it was during July and August, 1911.

Q. Got them all during those two months, you think?

A. No, I got some of them later; a few of them, one or two later.

Q. How much later?

A. A month or two.

Q. Did you get any of them up in October, then?

A. The Hunter mortgage may be as late as that, I don't remember.

Q. So up until that time you had faith in the project?

(Testimony of F. C. Koppen.)

A. I don't understand.

Q. Up until that time you had faith in the project?

A. Oh, yes.

Q. You thought it was a good project or you wouldn't have got your neighbors to go into it?

A. Yes, that is right.

Q. When did you have these conversations with DeLarm about the securities?

A. Well, principally at the time that we closed the deal for our land.

Q. When was that?

A. That was on April 22, 1911.

Q. And then of course you were satisfied with the securities?

A. At that time we believed them to be good.

Q. When did you have this talk in which you forced him to admit that the securities were all limited to the Wahluke lands?

A. That was in the latter part of 1911, I think.

Q. That is the nearest you can place it?

A. Yes; I think it was not more than a month or two before the collapse.

Q. Did you get any water mortgages for him after that?

A. Oh, my, no. Sometime before.

Witness excused.

[Testimony of M. Isabelle Forbes, for the  
Plaintiffs.]

M. ISABELLE FORBES, being called as a witness for plaintiffs, and being duly sworn testified.

(Questions by Mr. WILLIAMS.)

I reside in Seattle, Washington. My occupation at the present time, is assistant bookkeeper and filing clerk. During the year 1911, in the capacity of clerical work. I did some little bookkeeping, some stenographic work, and clerical work for DeLarm and Biehl. Went to work for them November 4, 1910, continued in their employ until January 4th, 1912. Mr. DeLarm was president of the Columbia River Orchard Company; Mr. Biehl was secretary. They ran the affairs of that corporation in their office at Seattle. The Washington Irrigation and Fruit Company were the same people, all the same thing. They had the affairs of that corporation in the office there.

I am acquainted with the signature of W. E. DeLarm, have seen him write frequently, and with the writing of A. J. Biehl, have seen him write frequently, and R. H. MacWhorter. Mr. MacWhorter, was connected with them in a general way, and I think one time he was trust officer, just for a short time of the Oregon and Washington Trust Company, and afterwards secretary of the Washington, Orchard, Irrigation and Fruit Company. Am acquaintanced with his hand writing, and know his signature. I



(Testimony of M. Isabelle Forbes.)

don't know the hand writing of H. H. Humphrey very well.

Signatures to the assignment of the Emil F. Cords water mortgage identified introduced in evidence over objection as irrelevant and immaterial and marked "Plaintiffs' Exhibit 43.

Another assignment introduced over same objection identified and marked Plaintiffs' Exhibit (43) (44).

Assignment of Alfred Gagner mortgage identified and introduced over same objection marked "Plaintiffs' Exhibit 44.

Another assignment of same mortgage introduced over same objections, marked "Plaintiffs' Exhibit 45, identified by witness.

Assignment identified and introduced, marked "Plaintiffs' Exhibit 46.

Affidavit of W. E. DeLarm, dated 19th day of August 1910, covering Desert Land Entry No. 1226, and some other property, identified and introduced over same objection, marked "Plaintiffs' Exhibit 47."

Assignment of Laura Wattle mortgage identified and introduced in evidence, same objection marked "Plaintiffs' Exhibit 48."

Another assignment identified and introduced, same objection, marked "Plaintiffs' Exhibit 49."

Handed book of the Washington Orchard, Irrigation and Fruit Company, identified as the minute book of the company the signature of W. E. DeLarm

(Testimony of M. Isabelle Forbes.)

and A. J. Biehl, as to pages 49, 50 and 51 identified also as to pages 52, 53, 54, 55, which were offered in evidence.

Mr. Wood cross examined the witness upon this point as follows:

MR. WOOD: What was your official position with this company?

A. Well, I don't know what I was.

MR. WOOD: I say, were you an officer?

A. I was supposed to be an officer; I don't know what I was, or anything about it; I just signed my name there, just as a lot of others have done. I don't know why they signed it.

MR. WOOD: In what capacity did you sign it?

A. I don't know. They just simply passed me that book and told me to sign my name to it.

MR. WOOD: Your name is signed in here, is it?

A. Yes, I think it is.

MR. WOOD: Well, will you find it, so I can see in what capacity it is signed. (Witness does so.) Is that your name?

A. Yes.

MR. WOOD: But you had nothing to do with making the book out?

A. I did not.

MR. WOOD: Or keeping the book?

A. No.

MR. WOOD: I will object to this as irrelevant

(Testimony of M. Isabelle Forbes.)

and immaterial, under the issue in the bill, and also as incompetent.

COURT: I understand Miss Forbes, that you recognize that as the minute book of the corporation?

A. Yes, sir.

COURT: Kept in the office. I think it is all right as to competency. Its materiality will be determined later.

Pages 49 to 51 introduced in evidence and marked "Plaintiffs' Exhibit 50," and pages 52 to 55, marked "Plaintiffs' Exhibit 51."

Court adjourned until May 15th, 1913.

**[Testimony of Lewis B. Sichlar, for the  
Plaintiffs.]**

LEWIS B. SICHLAR, being called as a witness on behalf of plaintiffs testified as follows:

I reside in Seattle, Washington, resided there 11 years. Occupation financial agent. Age 43 years.

Was acquainted with W. E. DeLarm and A. J. Biehl. Became acquainted with DeLarm in the fall of 1909. DeLarm left Seattle in the early part of February 1912.

Was familiar to some extent with the Columbia River Orchard Company bonds.

After the Columbia River Orchard Company, and the Washington Orchard Irrigation and Fruit Company, went into bankruptcy I was appointed as temporary receiver for both companies and later made

(Testimony of Lewis B. Sichlar.)

trustee of them. I was appointed trustee about the middle of March 1912.

Certified copy of petition in bankruptcy of Columbia River Orchard Company, introduced in evidence over same objection, marked "Plaintiffs' Exhibit 52," and other papers with reference to the bankruptcy proceedings introduced in evidence over same objection, marked Plaintiffs' Exhibit 53."

After I was appointed receiver I gathered together the assets of these two corporation, found the company owned some equities in acreage at Wahluke and was in position to maintain an action at law for the recovery of projected property which had been turned over to the Columbia River Water Company. Such a suit was brought, it resulted in a compromise finally, by which I paid the members of the Columbia River Orchard Company \$6500. in trustee certificates to compromise the suit and turned the property back to the trustee. The members of the Columbia River Water Company, were Edgar J. Wright and a Mr. Chapman, R. S. Chapman, and a Mr. Miller, I think. They had the title, claim and interest in and to the project over there, in so far as it pertained to the Washington Orchard, Irrigation and Fruit Company's properties. It covered the site of the pumping plant, and right of way for the ditches I think. I found no other property.

I investigated the status of the title of Section 29 Township 14 North Range 26 East, that was con-



(Testimony of Lewis B. Sichlar.)

tracted by the Columbia River Orchard Company, from Maltbie & Pearl. It was a conditional contract and the Irrigation Company having failed to comply with it and meet the payments the property reverted back to Maltbie & Pearl.

One or the other of the DeLarm companies, I believe, had a contract with the State for the East half of Section 16 and that also lapsed for the want of payment. They had an equity, I think, in Section 10, part of the 200 acres I mentioned before., they had an equity in that. The title at that time was in Mr. DeGraaf, I believe, I am not positive about that. Mr. DeGraaf, is a real estate man at Seattle. He acted as agent for the company occasionally in different business transactions, deals, etc., I didn't talk with Mr. DeGraaf, about the title, nor receive any communication from him. Mr. DeLarm, told me of the equity in the 200 acres along the latter part of January, probably a week or ten days before he left Seattle, 1912.

The property was heavily encumbered by mortgages held by lien holders and others. Mr. Fox, the contractor had the first mortgage amounting to sixteen of seventeen thousand dollars, and I think a Mr. Ellison, had a second mortgage for five or six or seven thousand dollars. They became indebted to Mr. Fox, for work done on the project, excavating ditches, canals etc. The land is worth about \$40 an acre. Mr. Fox, the contractor, had liens on the project it-

(Testimony of Lewis B. Sichlar.)

self aggregating \$32,000. The Puget Sound Bridge and Dredging Company, had a lien there for twenty-two or twenty-three thousand dollars. Gray and Barash had a lien on it for a thousand dollars. The Fox lien was on the canals, ditches, pumping plant, everything they could plaster it on. The Dredging Company lien was on the machinery and pumping plant, and canals and ditches. I think for material furnished and work *down*. There was a lien by a surveyor put against the property for four or five hundred dollars. These liens had a prior claim on all the assets there. Mr. Fox, had started foreclosure proceedings. I believe the Puget Sound Bridge & Dredging Company had started also.

Certified copy of the proceedings for the foreclosure of the lien of the Puget Sound Bridge & Dredging Company, introduced in evidence over same objection, marked Plaintiffs' Exhibit 54.

Certified copy of the Friel, Maltbie & Pearl contract covering Section 20, Township 14 North, Range 26 East W. M. introduced in evidence over same objection, marked "Plaintiffs' Exhibit 55."

Land contract of E. C. Davis and wife, introduced in evidence, marked "Plaintiffs' Exhibit 56," over same objection.

The proceeds of the Columbia River Orchard Company, were sold by me in the bankruptcy proceedings. They were sold for \$11,100 and some odd dollars and cents. That was for the interest of both

(Testimony of Lewis B. Sichlar.)

companies. I was trustee for the Washington Orchard Irrigation and Fruit Company and the Columbia River Orchards Company. Their interest was both sold at one time to Joseph R. Anderson. That carried everything. He assumed the liens against the property paid eleven thousand and some odd dollars. Of that amount \$6500 was paid on the trustee certificates that I had issued. \$2100 and come odd was paid to the contractor for doing emergency work at the time the intake was completed, and the balance was paid out for advertising the sale of the property, care, expenses, etc. The sale covered the 200 acres in the town of Wahluke, the project, the canals and pumping plant, there was no reservation whatever, except one reservation of a claim against Mr. Wakefield, growing out of a mortgage transaction down here in Oregon. It was a second mortgage, given to Mr. Wakefield, by Charles A. Kilbourne, covering the Tobey Brothers ranch. Mr. Wakefield, acted as agent for the Clapp Investment Company. The claim against Mr. Wakefield was for \$4300, which he had failed to turn over to DeLarm, under an agreement had with DeLarm, in which the mortgage transaction was involved. The deal was made in this way, as I understand it. DeLarm, sold a mortgage to Wakefield, who purchased it for the Clapp Investment Company, and in making payment to DeLarm he held out \$4300 out of

(Testimony of Lewis B. Siehlar.)

\$12400. I had no conversation with Mr. Wakefield about it.

The claims filed with me in bankruptcy aggregated in the neighborhood of \$1,300,000. Outside of that quite a few claimants filed their claims directly with the Referee in Bankruptcy. I didn't figure that up. There was a claim for a million dollar mortgage given the Oregon and Washington Trust Company, that was filed with the Court. There was a controversy regarding the validity of that mortgage. The Referee in Bankruptcy, I believe, declared the mortgage void and of no effect.

Certified copy of the record of the Federal Court of the Washington District of Washington, showing the objection to this million dollar mortgage being filed and adjudication declaring it to be invalid introduced in evidence over the same objection marked "Plaintiffs' Exhibit 57."

The claims that were filed against the corporation consisted of labor, material, bond claims, failure to comply with contracts, claims for land and water certificates, etc. I had a conversation with DeLarm in regard to the quantity of bonds, that were outstanding of the Columbia River Orchard Company, prior to his leaving Washington. He stated there were about four and a half million par value of bonds at that time outstanding.



(Testimony of Lewis B. Sichlar.)

Cross Examination.

(By Mr. ERSKINE WOOD.)

The deal referring (to the Clapp mortgage) was made thru the Clapp Investment Company, of which Mr. Lutz, is manager, and Mr. Lutz, is the man that carried on the negotiation with Mr. Wakefield. I understood that the money had been paid to Mr. Wakefield. I don't think Mr. Kilbourne, had anything to do with the sale of the mortgage, but it was a mortgage that Mr. Kilbourne gave to Mr. Wakefield. I was appointed trustee in March, 1912. One company went into bankruptcy after the other, possibly two or three weeks later. The Washington Orchard, Irrigation and Fruit Company went into bankruptcy first.

I found the assets to be, there were some equities around, but few of them, all the property at that time stood entirely, almost entirely, in the Columbia River Orchard Company name. That 200 acres was land that was traded in from Mr. and Mrs. Koppen, I think by DeLarm and deeded to DeGraaf.

The contracts, (referring to the Maltbie & Pearl contract Section 20 and the school land section), were made early in 1911, I think, and very few payments made on any of them. I don't know the exact date, but the parties with whom Maltbie & Pearl had contracts with Davis, Frield etc., they foreclosed and took their property back. I think Davis foreclosed in the fall of 1911, at least he started an action at that

(Testimony of Lewis B. Sichlar.)

time, but whether he carried it out then or later on I don't know. The companies began to go down hill during the summer and fall of 1911. Ostensibly the the affairs of the Company were in fair shape in March 1911. The agreement between Wakefield and DeLarm for the repayment of the \$4300, I don't think was in writing.

That (referring to the controversy over the \$4300) came about in this way, it seems that when the Clapp Investment Company paid the \$12400 to Wakefield, he turned it in part, over to DeLarm, and paid the balance of *in* in the bank. The bank shut down and kept it for a debt of Wakefield's own, as I understand it and he didn't have the money then to make good with DeLarm, so it remained a claim of DeLarm's against Wakefield, and I tried to enforce it and get the money in for the benefit of the creditors, but failed. He paid over to DeLarm 7000 and something. The payment of this \$4300 was a matter between DeLarm and Wakefield entirely.

#### Redirect Examination.

The default of the Maltbie & Pearl sections occurred in May 1911. The water plant, pumping station and canal were not quite completed, very nearly. When I became trustee, I made an estimate on them, the cost of putting in the power line, the understanding I had with the power people, was to the effect that if I paid them \$3,000. for the first years power, they would build the line in gratis, the amount

(Testimony of Lewis B. Sichlar.)

necessary for putting in the intake was \$2200, which I had to have done as emergency work, then a matter of eight or ten thousand dollars for cleaning, out the ditches and putting in the cement heardworks, etc.

Letter from E. C. Kilbourne, to the Washington, Orchard Irrigation and Fruit Company, dated March 24, 1911, identified and introduced in evidence, marked "Plaintiffs' Exhibit 58."

Recross Examination.

(Questions by Mr. ERSKINE WOOD.)

This letter says, among other things, that the present plant would give a capacity of 10,000 gallons a minute, at low water, and 25 per cent increase over this amount at high water period when you will do the most of your pumping. You never connected up with the power to test it out in any way, did you?

A. No.

Q. And you have spoken of the expense necessary to install a transmission line, to put in cement headworks, and complete the ditches, and complete the intake, but you found nothing to contradict this letter, that the pumping plant itself was complete and a good one, did you?

A. No, the work, as far as that is concerned, is all good. The ditches are first class, the building is good, and the machinery is all of it good standard machinery and fully able to do this work.

(Testimony of Lewis B. Sichlar.)

Q. Mr. Sichlar, did you estimate \$2100. as the cost of completing the intake?

No, that estimate came about in this way. The intake was unfinished and when the waters receded, it left a broken link in there, and it was necessary to fix that before the next high water in case you wanted to use it.

Q. And did you fix it?

A. Yes, and with the permission of the Judge, I had the contractor put in that broken link there; and the water receded to a lower level that year than it ever had been before for a great many years past; then I gave an additional order to put the intake out as far as he could, and that cost the balance.

Q. \$2100.

A. All told, yes.

Q. That was emergency work?

A. That was emergency work, yes.

Redirect Examination.

(Questions by Mr. WILLIAMS.)

You spoke of that being a broken link. Had that ever been completed?

A. No, that was a link in the intake that had been left, as I understood it, for want of material; material was short there, and they went out and did the work, as far out as low water would let them, and then being short of material left the broken link in between the material.

Witness excused.



### M. Isabelle Forbes Recalled.

Letter of W. E. DeLarm, dated September 9, 1911, directed to R. S. Chapman, Seattle, Washington, and identified introduced in evidence over the objection of irrelevant and immaterial, marked "Plaintiffs' Exhibit 59."

Affidavit of W. E. DeLarm, accompanying the Jennie C. Koppen mortgage, identified and introduced in evidence *in evidence* over same objection, marked "Plaintiffs' Exhibit 60."

Assignment of Mary A. Domay, mortgage, identified and the statement introduced in the records as follows:

Assignment shows an assignment of Mary Domay Water Mortgage covering Desert Land Entry No. 1173 and applying to the east half of the southwest quarter, the southeast quarter of the northwest quarter and the northwest quarter of the northeast quarter of Section 10, Township 14 North, Range 26 East, W. M. and dated the 3 day of January 1911, an assignment of the same mortgage read into the record as follows: The date of this assignment is 30th day of January 1911, and covers the same land described in the previous assignment.

Affidavit of W. E. DeLarm, identified and read into the record as follows:

"W. E. DeLarm, being first duly sworn, on oath says that he is the president of the Columbia River Orchard Company, a corporation, organized and ex-



(Testimony of M. Isabelle Forbes.)

isting under the laws of the State of Washington; that the desert land mortgage covering the southwest quarter of the northeast quarter of Section 10, Range 26, Township 14 East W. M., hereto attached, covering Desert Land Entry 1173, all good valid and solvent securities. W. E. DeLarm. Subscribed and sworn to before me this 30th day of June, 1911. Edward J. Brazell, Notary Public in and for the State of Oregon, residing at Portland.”

Affidavit of W. E. DeLarm, dated June 30th, 1911, identified and statement made in the record as follows:

The affidavit was the affidavit given under the trust agreement covering the Jennie E. Koppen, mortgage, on lands in Section 30, Township 14 North, Range 26 East, W. M.

MR. WOOD: I don't know whether the reporter got in the record, it is understood that after this all testimony goes in subject to our objection.

COURT: Subject to your objection, yes.

Letter, by Mr. Hodges, dated June 19, 1911, identified and introduced in evidence, marked Plaintiffs' Exhibit 61.

A mortgage for \$5,750,000. signed by Washington, Orchard, Irrigation and Fruit Company, by W. E. DeLarm, president and R. H. MacWhorter, secretary, identified, and also assignment of the same to the Oregon and Washington Trust Company introduced in evidence marked "Plaintiffs' Exhibit 36.

(Testimony of M. Isabelle Forbes.)

Note accompanying mortgage introduced in evidence marked "Plaintiffs' Exhibit 36.

Financial statement introduced in evidence marked "Plaintiffs' Exhibit 62.

The witness continued, the sales contracts were all in the same form, and were issued on the lands the company had a contract for with Maltbie & Pearl. I don't know what number it was, but it was some of their lands, school section, was Section 16. The sections as I remember were Sections 10, 16 and 20 and all within the Wahluke project (referring to the lands upon which the sales contracts were placed). They issued no contracts, to my knowledge, outside of the project.

Financial statement of the Washington, Orchard, Irrigation and Fruit Company, to the Fidelity and Deposit Company of Maryland, dated March 11, 1911, identified and introduced in evidence, marked "Plaintiffs' Exhibit 63."

Summary of irrigation project of the Columbia River Orchard Company, signed by the Columbia River Orchard Company by W. E. DeLarm president, and A. J. Biehl, secretary, identified and introduced in evidence, marked "Plaintiffs' Exhibit 64."

Financial statement of the Washington Orchard Irrigation and Fruit Company, without date identified, marked "Plaintiffs' Exhibit 65."

Letter to J. H. Fox, signed by Washington Orchard, Irrigation and Fruit Company, by W. E. De-

(Testimony of M. Isabelle Forbes.)

Larm, president, dated April 8th, 1911, identified, introduced in evidence, and marked "Plaintiffs' Exhibit 66."

Minutes of the stockholders meeting of the Washington Orchard, Irrigation and Fruit Company, dated August 9, 1911, identified and introduced in evidence, marked Plaintiffs Exhibit 67.

Agreement between R. S. Chapman, and W. E. DeLarm, of September 9, 1911, identified and introduced in evidence, marked "Plaintiffs' Exhibit 68."

Letter R. H. MacWhorter, to George C. Hodges, dated Tacoma, Washington, 2-25-1911, identified, and marked "Plaintiffs Exhibit 69."

Letter dated March 4, 1911, to the Standard Investment Company from the Oregon and Washington Trust Company, by H. H. Humphrey, vice-president, identified, marked "Plaintiffs Exhibit 70."

Letter of April 28th, 1911, Mrs. Belle Nickel, by the Oregon and Washington Trust Company, identified, introduced marked "Plaintiffs' Exhibit 71."

Witness continued, DeLarm was in *char* of the office generally at Seattle, of the Washington Orchard Irrigation and Fruit Company, and the Columbia River Orchard Company. Mr. Biehl, had one office, was in charge part of the time, from November 1910, when I went there the financial condition, so far as I was concerned wasn't very good. I learned that principally because I didn't get my salary. The other financial embarrassment was, one

(Testimony of M. Isabelle Forbes.)

to half dozen people were sitting around the office all the time waiting for communication with DeLarm, in which most all of them, stated to me that they wanted money. That was from the very first day I went with them, and continued until I left them. That condition existed in February 1911 and thru March. They didn't pay their office rent promptly. I remember because once or twice I took checks to the people whom we rented of and the checks came back to me, marked "N. S. F." "Not sufficient funds." I had two or three checks come back myself, and the telephone company had one or two come back and a manufacturing man there had one or two come back. Several instances, I can't recall them all. These instances relate to different dates. The rent checks were in April and March I think the first check we paid them wasn't good, the second we paid them wasn't good, and then I don't know how they managed after that. That was in the 1911. The parties that *cam* in generally stated their troubles when I would listen to them.

I talked with DeLarm and Biehl, afterwards about them. I didn't go and see DeLarm and Biehl, immediately when they came to the office, that wasn't permitted, oh! they didn't go in and see DeLarm and Biehl, they weren't permitted, I didn't permit them. I was instructed by DeLarm and Biehl to keep them out. They gave me that instruction when I first went there. They told me that I was to find out what



(Testimony of M. Isabelle Forbes.)

a person wanted and see what their business was, and if it related to any business transaction why, I was to make an appointment for them and let them in, if it was just merely a person that wanted to collect anything, that they would have to see them when they could. I was not instructed to make any appointments for those who wanted to make collections.

The first one of these checks that I remember anything about, that was my own check. DeLarm and Biehl both signed the checks, and sometimes Mr. Biehl would give me one and sometimes Mr. DeLarm. The account was DeLarm and Biehl, but either one of the men signed the checks. The last one of these checks I remember anything about was in the summer months of 1911, when they gave Mr. Hunter a check. I don't know what the amount was, and that is the last time I remember anything about the checks coming back.

They didn't have any book accounts in the office. They didn't have any books of the Columbia River Orchard Company or the Washington Orchard Irrigation and Fruit Company, that I know anything about, and they had none of the firm that I know anything about?

There were in the office, employed there, another stenographer and myself. The other stenographer was employed there October 1911, until the Company went into bankruptcy. Before that time they had

(Testimony of M. Isabelle Forbes.)

public stenographers, but no one in the office besides myself. There was no other office help in the office of any kind besides myself prior to the other stenographer.

Q. Is there any other way by which you knew of their financial difficulties besides those dishonored checks?

A. Well, nothing only the creditors as they would come in. I knew them mostly.

They didn't pay their rent promptly or my salary. I received anywhere from \$1.00 to \$20.00, just as they had it they would give it to me. I received 25c one day. I asked Mr. Biehl, for some money. I told him I had to have some, and he, I think, had 35c in his pocket, and he asked me how much I wanted, and I said all I could get, and he said "How much will do you," and I said I have to have lunch money, so he gave me 25c.

Q. Was your salary at that time paid in anything else besides money, and if so, what?

A. Well, I think in the early part of December I took 10,000 bonds, and I credited \$50. which was more *that* the amount they were getting at that time for bonds. That was in 1911, I asked Mr. DeLarm, to give me some money, and I told him I had to have it. He said he didn't have any, that he was anticipating getting some money, but at that time he didn't have any to give me, and I asked him if I could use some bonds and return them or else credit them on

(Testimony of M. Isabelle Forbes.)

my salary at the amount he was getting at that time, and he said Yes, I could do anything I wanted to, which ever way would be more convenient to me either to wait for the money or take the bonds, so I took the bonds and credited \$50. to my account. I sold the bonds, I don't remember just what I got for them. I was familiar with the market on the bonds from March 1911 to the end of the year. I handled the bonds in the office.

I think the first day I went with the company I saw bonds, that was the February issue of the 7% bonds. The bonds were issued in 1910, but they were supposed to be February bonds of 1911. A lot of them were printed in 1910. I don't know when they first put these bonds out. They came from the printers and Mr. Biehl, was signing them when I first knew anything about bonds, and as he would sign them I would put the seal of the company on them, and fold them, and after that I knew nothing about them. The first bonds that I knew anything about I traded some land for, and that was the first that I knew anything about them trading bonds. They were taking in properties, and I don't know that they ever sold any directly from the office for cash. The brokers handled some of the bonds, paid different price for them. There were different series of bonds. There were February bonds that were selling for 4c and June bonds were selling for about 3, October bonds were selling for about 2½c.

(Testimony of M. Isabelle Forbes.)

I can't remember the different sales in the summer months. They were selling for about 4c on the dollar. I don't know what arrangements the brokers had, but they would come in and get the bonds from me and I would take the receipt and amount, and only once to my certain knowledge did I receive any money; money was always turned over to DeLarm, I presume. I think, I took \$20.00. I gave out I think \$10,000 bonds to Mr. Custer, George W. Custer. That was later in 1911. I got \$2,000, in bonds for my property but I didn't trade my property thru the company. They paid out bonds as security for lands.

The only loan that I was particularly interested in was a loan for a \$100 from a Mr. A. D. Hawkins, for which I delivered I think, \$2,000 bonds. I think, that was in May.

When any inquiry was made in regard to the quantity of land they held at Wahluke I always quoted 17,000 acres. I got that information from Mr. DeLarm, that was all I ever knew about it, for instance, in writing letters I would always quote 17,000 acres selling for \$350. an acre, then he would quote this about the \$125. being back of each bond etc. I don't remember the exact wording of the letters, because it has slipped my memory.

We kept no records in the office in regard to these land contracts. I did at first keep a record on a plat used there. I just made that for my own personal



(Testimony of M. Isabelle Forbes.)

use. I just drew the squares on a piece of cardboard and colored them and put the names of each individual who had purchased five acres or whatever the amount *mighbe*. Some of it was in Section 10, 20 and 16.

Receipt of A. D. Hawkins, for bonds upon which he had loaned money, taking the bonds as security were identified and read in evidence as follows: Receipt dated April 27, 1911, receipting for \$8,500. Columbia River Orchard bonds, for a loan of \$1120. for 30 days. Also receipt of May 22, 1911, for 20 bonds of a thousand dollars each, for a loan of \$700. for 30 days. Receipt of June 9, 1911, for 22 Columbia River Orchard bonds of \$1,000. each, for loan of \$1,000. due in 30 days. Also receipt of June 16, 1911. \$25,000. Columbia River Orchard Bonds for a loan of \$1,000. for 30 days. Also receipt of 6|3|11, for \$20,000. Columbia River Orchard bonds for a loan of \$750. for 30 days. Also 25 Columbia River Orchard bonds under date of June 3, 1911, \$1,000. each for \$1,000. loan, due in 30 days from date. Also receipt of 5|29|11 for \$15,000. bonds for 30 day loan of \$500. Also receipt of 6|15|11, \$25,000. bonds as security for a loan of \$1,000. Time due not stated. And a receipt identified by the witness of \$5,000. of Columbia River Orchard bonds without date, for loan of \$750., all of the receipts being signed by A. D. Hawkins and the signatures being admitted as genuine by counsel for defendants,

(Testimony of M. Isabelle Forbes.)

COURT: Who are they given to?

MR. WILLIAMS: Given to the Columbia River Orchard Company some, to Biehl, some to DeLarm and Biehl, and some to DeLarm.

Letter from George C. Hodges to DeLarm and Biehl, dated February 2, 1911, identified and introduced in evidence marked "Plaintiff's Exhibit 72.

Letter from Mr. Hodges, to DeLarm and Biehl. February 3, 1911, identified and introduced, marked "Plaintiff's Exhibit 73".

Letter same parties February 5, 1911, introduced "Plaintiff's Exhibit 74".

Court adjourned until 2 P. M.

MISS FORBES, continued her testimony.

Letter from R. H. MacWhorter to the Oregon and Washington Trust Company introduced and identified, "Plaintiff's Exhibit 75."

For a short time R. H. MacWhorter, signed the bonds as trust officer between the time Mr. Hodges—was here and Mr. Biehl.

Agreement between A. J. Biehl and John Stevens identified and introduced "Plaintiff's Exhibit 76".

Letter of May 3, 1911, DeLarm and Biehl to Leonard Agency introduced, "Plaintiff's Exhibit 77".

Letter of October 4, 1910, Mr. Hodges to Columbia River Orchard Company, introduced "Plaintiff's Exhibit 78."

(Testimony of M. Isabelle Forbes.)

Letter dated October 6, 1910, Mr. Hodges to the Columbia River Orchard Company, introduced, "Plaintiff's Exhibit 79".

Letter October 8, 1910, Mr. Hodges to the Columbia River Orchard Company, introduced "Plaintiff's Exhibit 80"

Letter of December 6, 1910, Mr. Hodges to Columbia River Orchard Company, introduced "Plaintiff's Exhibit 81."

Letter of 1/26/11 Mr. Hodges to Mr. Black, introduced "Plaintiff's Exhibit 82".

Letter of January 27, 1911, Mr. Hodges to F. D. Cooley, introduced, "Plaintiff's Exhibit 83".

Letter February 9, 1911, DeLarm and Biehl by George C. Hodges, introduced, "Plaintiff's Exhibit 84".

Letter of February 11, 1911, DeLarm and Biehl by George C. Hodges, introduced, "Plaintiff's Exhibit 85."

Letter of February 14, 1911, DeLarm and Biehl, by George C. Hodges, introduced, "Plaintiff's Exhibit 86."

Letter of February 15, 1911, written to W. A. Burley Green Lake Station, by George C. Hodges, introduced, "Plaintiff's Exhibit 87"

Letter February 21, 1911, George C. Hodges, to DeLarm and Biehl, introduced, "Plaintiff's Exhibit 88".

Letter February 24, 1911 George C. Hodges to

(Testimony of M. Isabelle Forbes.)

C. H. Graves, introduced, "Plaintiff's Exhibit 89".

Letter March 1, 1911, to DeLarm and Biehl, signed Hodges introduced, "Plaintiff's Exhibit 90".

Letter of March 3, 1911, to DeLarm & Biehl, signed Hodges, introduced "Plaintiff's Exhibit 91".

Letter of March 7, 1911, by Hodges to DeLarm & Biehl introduced, "Plaintiff's Exhibit 92."

Letter of March 14, 1911, to S. C. Douglas, Seattle, by George C. Hodges, introduced, "Plaintiff's Exhibit 92"

Letter of March 21, 1911, to C. H. Graves, by George C. Hodges, introduced, Plaintiff's Exhibit 94".

Letter of March 29, 1911, by George C. Hodges to DeLarm and Biehl, introduced, "Plaintiff's Exhibit 95".

Letter of March 31, 1911, to DeLarm and Biehl, by George C. Hodges, introduced, "Plaintiff's Exhibit 96".

Letter April 3, 1911, to J. B. Lowry, cashier Citizens National Bank, Chattanooga Tennessee, by George C. Hodges, introduced, "Plaintiff's Exhibit 97".

Letter of April 4, 1911, to DeLarm and Biehl, by Hodges, introduced, "Plaintiff's Exhibit 98".

Letter of April 4, 1911, Hodges to DeLarm and Biehl, introduced, "Plaintiff's Exhibit 99."

Letter of April 6, 1911, to DeLarm and Biehl, by



(Testimony of M. Isabelle Forbes.)

George H. Hodges, introduced, "Plaintiff's Exhibit 100".

Letter of April 7, 1911 DeLarm and Biehl by Hodges. introduced, "Plaintiff's Exhibit 101".

Letter April 10, 1911, to William Crawford, Seattle, Washington, by George C. Hodges, introduced, marked "Plaintiff's Exhibit 102".

Letter of April 27, 1911, to O. M. Joseph, signed by Geo. C. Hodges, introduced, marked Plaintiff's Exhibit 103.

Letter May 1, 1911, to DeLarm and Biehl, written by George C. Hodges, introduced, marked "Plaintiff's Exhibit 104".

Letter of May 10, 1911, to W. E. DeLarm, by George C. Hodges, introduced, marked "Plaintiff's Exhibit 105".

Letter of May 15, 1911<sup>m</sup> to DeLarm and Biehl by George C. Hodges, introduced, marked "Plaintiff's Exhibit 106".

Letter of June 21, 1911, to Mr. H. E. Wood, Eugene, Oregon, signed by George C. Hodges, introduced, marked "Plaintiff's Exhibit 107".

Letter of July 27, 1911<sup>m</sup> to DeLarm and Biehl, signed H. introduced, marked "Plaintiff's Exhibit 108".

Letter of July 28, 1911, to W. P. Rauch, not signed, introduced, marked "Plaintiff's Exhibit 109".

Letter August 17, 1911, by George C. Hodges, to

(Testimony of M. Isabelle Forbes.)

W. E. DeLarm, introduced, marked "Plaintiff's Exhibit 110".

Letter of August 18, 1911, to DeLarm and Biehl by George C. Hodges, introduced, marked "Plaintiff's Exhibit 111"

Letter of Sunday, no other date, written to DeLarm and Biehl, signed Hodges, introduced, marked "Plaintiff's Exhibit 112".

Letter of Tuesday 21|1911, written by Jack to De, introduced, marked "Plaintiff's Exhibit 113"

Q. Miss Forbes, what did they generally call Mr. DeLarm?

A. De.

Letter of Tuesday 17th, no other date, to Dear De, signed Jack, introduced, marked "Plaintiff's Exhibit 114".

Letter of the 8|10|11, to Dear De by Jack, introduced marked Plaintiff's Exhibit 115".

Letter of the 8|19|11, to W. E. DeLarm, signed Jack introduced, marked "Plaintiff's Exhibit 116".

Letter of the 8|21|11, Dear De, by Jack, introduced, marked "Plaintiff's Exhibit 117".

Letter of 8|22|11, Dear De, by Jack, introduced, marked "Plaintiff's Exhibit 118".

Letter of August 23, 1911<sup>m</sup> to W. E. DeLarm, by Jack introduced, marked "Plaintiff's Exhibit 119."

Letter of 8|24|11, to Dear De, by Jack, introduced marked "Plaintiff's Exhibit 120".

Letter of August 25, 1911, to R. S. Chapman,

(Testimony of M. Isabelle Forbes.)

signed A. J. Biehl, introduced, marked "Plaintiff's Exhibit 121".

Letter September 1, 1911, W. E. DeLarm by Jack, introduced, marked "Plaintiff's Exhibit 122".

Letter of 9|3|11 to De, by Jack, introduced, marked "Plaintiff's Exhibit 123".

Letter of 9|11|11, Dear De, by Jack, introduced, marked "Plaintiff's Exhibit 124".

Letter of October 11, 1911, Dear De by Jack, introduced, marked "Plaintiff's Exhibit 125".

Letter of October 12, 1911, to De Dear by Jack, introduced marked "Plaintiff's Exhibit 126."

Letter of October 25, 1911, to *De De*, unsigned, introduced marked "Plaintiff's Exhibit 127". Identified.

Letter of November 14, 1911, to Dear Sir by Jack, introduced, marked "Plaintiff's Exhibit 128".

Letter of November 22, 1911*m* to De, by Jack, introduced, marked "Plaintiff's Exhibit 129".

Letter of December 15, 1911, to F. W. Waters, by A. J. Biehl, trust officer, introduced, marked "Plaintiff's Exhibit 130".

Letter without date, to Dear DeLarm, by Jack, introduced, marked "Plaintiff's Exhibit 131."

Letter of December 26, 1911, to W. E. DeLarm, by A. J. Biehl, introduced, marked "Plaintiff's Exhibit 132".

The witness continued, the last time I say DeLarm, I think it was the last of February, 1912. I

(Testimony of M. Isabelle Forbes.)

left his employ the 4th of February, but I saw him frequently.

At this time it is admitted by Mr. Wood, that Mr. DeLarm, has disappeared and is supposed to be dead.

Witness continued, A. C. Gunn, is a financial broker. He wasn't very closely connected with the Columbia River Orchard Company. I think he loaned them money. He would get bonds from me and sell them. I got part of my salary from Mr. Gunn, for two or three months. The first check I got from Mr. Gunn, Mr. Biehl, got for me. I told Mr. Gunn, that I was going to leave, and he told Mr. Biehl, and Mr. Biehl, came in that afternoon and gave me a check for \$25. and told me that they were going to put over a big deal, as they usually said, and if I would stay they would close my account out in a few days, and after I found out I could get money from Mr. Gunn, I went over and got it myself. I got it to apply on my salary. I guess I got a hundred follars or more.

I knew Mr. Morrison, but I don't know whether he sold any bonds or not.

Cross Examination.

(Mr. WOOD.)

I commenced work for the company first of November 1910, and lect November 4, 1912. I don't remember when it was I got the two bits advanced for lunch. There is an accurate date of every piece



(Testimony of M. Isabelle Forbes.)

of money I received from the company, but I haven't that. It is here in the papers. The dates are all in that book. I got the 25c from Mr. Biehl, they seemed to be hard up all the time. Mr. DeLarm, all the time. I don't think they got rich out of this. They seemed to be personally hard up as well as the Orchard Company. The bonds I put the seal on were the February issue of the Columbia River Orchard Company. It was in November 1910. I put the seal on all the bonds, nearly, that went out of the office.

Q. Well, I am trying to distinguish the fact, as a matter of fact, the printer of the Orchards bonds testified they weren't in existence at the time you say.

A. Well, I can't help what he testified. I am only telling you what I know.

I am not absolutely sure whether it was the first day that I went there or not, that I folded the Orchard Companys bonds but I know I wasn't there very long. It would be in November 1910.

I put the seal on the Orchard Irrigation and Fruit Company bonds, I both, sealed and folded them. But I think that was later. I just don't know when they were printed; it was in the summer of 1911. I can tell you nothing about the date, because I never paid any attention to it, but I know it was after we moved in the Empire Building, which was in April 1911.

(Testimony of M. Isabelle Forbes.)

Witness looked at her book, and was asked to state what month you got that 25c

A. May 2, 1911, the first money I got from Mr. Gunn, was on July 8, 1911; then on the 10th I got \$10.00, and on the 11th I got \$25, and on the 13th I got \$15.00; on the 15th I got \$10.00; on the 25th I got \$10.00; August 1st, I got \$10.00, August 23rd I got \$15.00, and on the 26th of September \$41.00 that was all in 1911.

They were getting more and more hard up, in the year 1911, to such an extent that on January 4th, 1912, they owed me \$253., and that is when I left them. They never even had stamps in the office. I had to buy stamps, envelopes and everything else. In December 1910, they gave me \$10.00 for office expenses, and from November 4th until November 10th of that year I spent \$5.46, of it. Mr. DeLarm, took \$2.00 of it for office supplies. They gave me the first week I was there on my salary, and the second work, then they didn't pay me, they said they always held back a week's salary, and they held back a week and two weeks up until such time as they owed me \$253.

I always carried a balance from \$50. to \$100. The bonds I took for my \$50. were the October issue unguaranteed bonds. I took them on December 9th. There were four series of bonds issued to the Orchard Company, to my certain knowledge. The first issue was made when I went with them in November 1910; then later we had a June bond is-

(Testimony of M. Isabelle Forbes.)

sue, which was really on the market before June, then we had an October issued called Series A, and another October issued called Series B unguaranteed bonds. The rate of interest was 7%. The bonds that were outstanding on the trust held by the Washington Savings & Trust Company were 8% that were already outstanding.

Q. Well, this seven per cent bond, I will say for your information, although I think I have already called it to your attention; you seem very sure of it, the printer says were not printed at that date, in November. They weren't printed until after the first of January 1911.

A. Well, I may be mistaken, still I say that I am sure it was in November, I folded those bonds, The seven per cent bonds.

Q. But as a matter of fact, Miss Forbes, you have folded a great many bonds both Fruit and Orchard Company, at different times, and you may be mistaken.

A. I say, I maybe yet, I don't think I am.

I don't know how many they sold. Those 10,000 bonds I took on my salary I credited myself with \$50.00, that is credited the account and charged myself with \$50.00. I don't remember whether I sold them for two, two and a half or three. I sold part of them to a party in Vancouver, B. C. I think I sold some to Mr. and Mrs. Koppen. I bought the 10,000 at \$50.00, and sold them for what I could get

(Testimony of M. Isabelle Forbes.)

on them. They were not on my hands as collateral for \$50.00. That was on December 9, 1911.

Redirect Examination.

(By Mr. WILLIAMS.)

The bonds I got were October bonds, the interest was payable in 1912. I got them on December 9, 1911.

The Washington, Orchard, Irrigation and Fruit Company had some bonds printed, but I don't think that there were but two lots that were given out to anyone. I think Mrs. Koppen got some, and Mr. Armstrong got some, and that is the only two people that I know anything about.

My unpaid salary at the time I quit work was \$253. I was acquainted with the land certificates that they issued. They were issued to take up bonds, that is what I understand. I don't know exactly how many of these they put out, but there is a book memorandum here of the total amount. I don't see the book here.

Witness identified one issued to herself. The certificates were all in that same form. One to witness introduced in evidence, marked "Plaintiffs' Exhibit 133."

I knew that a receiver was appointed for the Columbia River Orchard Company in March 1911. I received a call from him. At that time I really didn't know what a receiver meant. It was Mr. Heaton, one of the witnesses here. He came into the office and asked me for the books and records, and I said



(Testimony of M. Isabelle Forbes.)

“why I hadn’t any,” and he told me who he was and said he had been appointed receiver, and he wanted all the books, papers and everything connected with the company, and I gave him privilege to go thru. We had three offices and I just told him to (*go*) thru and take everything he could find, but not to come over on my side. I didn’t know who he was or anything about it. He asked me, if I had any bonds, I said, “Yes, I have,” he said he would take them. I said, “No, you won’t,” then he told me that he had to have everything, that the Court had appointed him receiver for the Company, and that he had to have everything, and I told him he could, but I didn’t see him take any. That was the only receiver that I ever knew anything about.

Recross Examination.

(By Mr. WOOD.)

I was their general office woman there. I always posed as a bookkeeper, yet I knew something about stenography before I went with them.

Q. Now, the point I want to bring out—you seem to be really a very capable young lady, and why did you stay with them to the close if they weren’t paying you your salary?

A. Well, I guess it is for the same reason we are all struggling. Just the same reason you are trying; this case, I guess, to try to win. Every one told me—there was only one person of all the people I knew who told me to get out of the company, and that was

(Testimony of M. Isabelle Forbes.)

Mr. Gray, Mr. Clarence W. Gray. About the first or second day I went with the company, he told me I would have to be very careful to get my salary, or I would have to do as the girl before me did. He tried to discourage me in that way, but every one else told me that they thought everything would be all right, and I got so deep into their debt, I couldn't figure any other way, only staying through.

I hoped right along they would win, because Mr. DeLarm always talked to me about the great big deals they were going to put thru, and I thought some day I would really win.

Mr. Gray, was just one of the men that frequented the office. He was not a lawyer. I think he had some connection with the company, but not after I went with the company. I don't know what the relation was. Mr. Custer, who got some bonds once, was a lawyer. He acted in that capacity. There were two or three lawyers connected with the company, he was one of them.

By the COURT: Miss Forbes, I don't know whether I understood your testimony. Was there any record kept in the office, to your knowledge, of the bonds issued.

A. Only what I kept. The last issue of the bonds I kept track of them, because I numbered them with a numbering machine.

COURT: What issue is that?

A. October issue, unguaranteed bonds.

(Testimony of M. Isabelle Forbes.)

COURT: The last issue?

A. Yes.

COURT: The bonds issued prior to March 1, 1911, did you have no record of them?

A. No, I didn't have any record of them, only as the bonds were cancelled. The February bonds that were cancelled, we tried to keep track of them, but I don't think we kept it up.

COURT: What do you mean by February bonds?

A. That is the first issue of bonds, February seven per cent bonds.

COURT: Do you mean issued in February, or due?

A. Payable in February, that is the way we designate.

COURT: You don't know then what were outstanding then?

A. I don't know what number of February bonds were out, neither do I know what number of June bonds were out. There were 711,000 of them unguaranteed October bonds.

Q. When were the June bonds issued?

A. They were on the market before June 1911.

COURT: How early in 1911.

A. I don't remember just when we got those bonds out.

Q. (Mr. WOOD): A lot of the bonds kept coming in and being redeemed and being replaced by other bonds didn't they.

(Testimony of M. Isabelle Forbes.)

A. Yes, I think Mr. DeLarm's idea was to get in the early issue, and put out a later issue. He would always give a premium on the old issue. We didn't keep any record of that.

Q. What do you mean by premium?

A. For instance, it would depend altogether on who we were dealing with. Maybe someone would come in with 2,000 February bonds and would demand 4,000 June bonds, or 6,000 October bonds. We would give more of the later issue to redeem the early issue.

In my testimony I spoke of my own case, and said \$10,000 bonds, I meant 10,000 dollars face value of bonds.

Q. And you meant that all the time you haven't been saying the number of bonds, but the dollars of face value?

A. Yes, that was the number of dollars face value. I meant I had \$10,000 face value of the bonds.

**[Testimony of J. L. Blalock, for the Plaintiffs.]**

J. L. BLALOCK, being called as a witness on behalf of the plaintiffs, duly sworn testified.

(Question by Mr. WILLIAMS.)

I reside at Arlington, Oregon. Resided there in the town for eight years, but in the country for 32 years. Occupation farmer. Am acquainted with the Tobey Brothers ranch, belonging to Frank and Will Tobey. Probably twenty years ago that I was



(Testimony of J. L. Blalock.)

over part of the lands, since I first knew part of the land, but I cann't remember dates.

Am familiar with land values in that neighborhood, and were familiar with them in March, 1911. Of the character of the lands that the Tobey boys owned. I considered that land, any agricultural land in that country, that is in proper state of cultivation worth from twenty to twenty-five dollars an acre.

Cross Examination.

(By Mr. ERSKINE WOOD.)

I reside at the east end of Shuttler's flat, on the east of it, not on the flat to amount to anything. The flat is one of the best pieces of land in northern part of Gilliam County. One of the best wheat lands there. All that belt of country, north of Rock Creek, is about the same character of soil, very little difference in it. I don't think there is any difference in the soil from Gwendolen or North Gilliam. I think the soil is about the same all though there is a stretch of country thru there that is not as deep soil as it is further north. The rain fall is about the same. It is true that they have more rain in the Condon country.

I have land there now twelve or fourteen miles from the Tobey land in the Blalock country, northwest. I consider it worth \$20 or \$25. an acre. I have 3320 acres, haven't sold any, but have offered to sell my place for \$25. an acre. Never have had a taker. I have never put my land on the market trying to urge a sale at all.

(Testimony of J. L. Blalock.)

The crops up there between the years 1907 and 1912, were light, very light, all over that district. Four seasons there, we were very light. Naturally it would be a little discouraging, in the spring of 1912.

Q. I meant, in the spring of 1911, after these three disastrous years, the people were kind of discouraged, weren't they?

A. Well of course, it made pretty hard times, of course, when the crops aren't good.

I heard of one sale made this last spring for \$20. There hasn't been much land changing hands. There is very few sales anywhere in the country, nothing only trades, trade is all there is anywhere. It might be possible that sales have been made as low as \$10, or \$11, or \$12 an acre, I haven't heard of any. I heard of one for \$30—partially in trade. That was the Ed Tobey trade. There have been sales of land there for \$10. an acre, 15 or 20 years ago, probably land could have been bought for \$10. an acre, I should judge 18 or 20 years. I can't remember of course, how long it has been since the high price on land. I don't recall any sales between \$15. and \$20. an acre during the past three or four years. There is so few that I don't remember a sale except the two that I mentioned, anywhere in that part of the country. There may have been sales up around Condon. I see a notice in the paper once in a while, but it never *give* the price, you know, probably a consid-

(Testimony of J. L. Blalock.)

eration of \$10. or something of that kind. There is more people coming in at the present time, that is, there is more people there than there was 15 or 20 years ago, but of course they were homesteaders.

Q. But were there more people there in 1911, *that* there were in 1905.

A. Well, that is pretty hard to answer. I don't know of anything that has ever been abandoned.

Redirect Examination.

(By Mr. WILLIAMS.)

The greater portion of the farms are good sized farms. It is a sparsely settled country, not a thickly settled country by any means. They seem to want to farm on a large scale, of course they don't like to take up any small proposition.

Recross Examination.

(By ERSKINE WOOD.)

My land compared with the Tobey Brothers land is of just about the same character of soil. Of course they are a little farther back, they are farther from the railroad, and I wouldn't consider it quite as valuable for that reason. As far as the character of the soil is concerned I consider it just about the same. We have to go on values, something about how the land lies, so that you can get your wheat to market. It costs more, of course, for them to market their grain than it does me. As far as the land is concerned I consider it just as good as mine. It lies well, of course, it is rolling, it is all rolling prairie,

(Testimony of J. L. Blalock.)

owing to the distance from the railroad I would consider theirs of slightly less value than mine. \$25. an acre is the least money that will get mine.

Cross Examination.

(By Mr. FLEGLER.)

In 1911, it was a little discouraging. There was a lot of wheat that wasn't cut in the country, quite a lot of it. 1911, was the one year that I remember but what the grain was cut. That year we had on the place six or seven hundred acres that wasn't cut. It should have been cut but it wasn't. There was 320 acre in one place I remember that wasn't cut at all. It would have paid to have headed it. My place was rented, and a lot of creditors came in, and they thought they knew more about it than anybody else, and they thought they ought to turn the stock in and they did, but they lost by it.

Redirect Examination.

The branch road runs within five miles, I think, of Olex. Mikkalo, I should judge to be about seven miles to the nearest point of the ranch to this place.

**[Testimony of R. T. Cox, for the Plaintiffs.]**

R. T. COX, being called on behalf of plaintiffs, duly sworn, testified as follows:

(Questions by Mr. WILLIAMS.)

I reside in Portland, Oregon, am acquainted with farming land in Gilliam County, near the town of Olex, to some extent. I have charge of certain land



(Testimony of R. T. Cox.)

in that immediate vicinity. I am there about two or three times a year. Am only familiar with the Tobey lands in rather a vague way. My people whom I represent, something over 1000 acres, which joins part of the Tobey Brothers land, on the south. The county road passing in between. I am not very familiar with the Tobey Brothers Land, except that portion I have seen from the road. I don't know that I have ever been on the land. I have an opinion as to the value of our tract. We have a 1600 acre tract about eight miles southwest in the same township. My opinion is based upon knowledge of lands and valuations in that neighborhood, in a general way. My opinion would be based largely on hearsay. I don't know of many, if any sales having been made there in recent years, and the quality of the land varies so, in different localities.

If the land was within a reasonable distance from a railroad, which distance I would say, would be about eight or nine miles, worth about a dollar an acre for every bushel of wheat that it would produce.

Cross Examination.

(By Mr. ERSKINE WOOD.)

I would think that spring wheat there would generally yield on an average ten or fifteen bushels per acre, and fall wheat perhaps from twenty to thirty; that is the general average for quite an area of country around there. They could use either fall or spring sowing. They generally plow as much as

(Testimony of R. T. Cox.)

they can in the spring, what they call summer fallowing. That land is sowed the following fall, and if they have an open winter or any additional time, they plow and sow in the spring. That average yield which I spoke of is based upon a fair rain fall, fair season and not on a period of years including the bad ones. It didn't average that high on my place. My tenants, I am sorry to say, were rather poor farmers, and I do not think the land got justice in the way of tillage.

The estimate of yield for that district takes in the whole of Shuttler's flat. The flat district, it has been considered better wheat land, than land farther to the north. For instance, better land than the land in the Blalock country. It is rather difficult to say exactly where Shuttler's flat begins and where it ends, but I should say that the Tobey ranch is from two to three miles away. 1907 and 1912, were very good years. The intervening years were very light, owing to the lack of rain fall. I don't know of any sales having been transacted in the spring 1911.

#### Redirect Examination.

In the summer of 1912, some wheat was being sold at 70; F. O. B. I don't think the price averaged much, if any over that, until about the middle of January. I sold my wheat about the first of January, and got about 70c for it. A very short time after the market began to go up. I don't remember the price in 1910, I didn't have any to sell in 1910. In

(Testimony of R. T. Cox.)

1912 on our place the average yield was about 20 bushels, but that included fall wheat, spring sown wheat and quite a good deal of volunteer. On a small portion of the fall sowing, we got something over 50 bushels. That was on a 5 acre tract, which was staked off and entered for a special agricultural prize, that was offered in Gilliam County, that is why I happen to know of the good yield of this particular piece. There was about a half section in fall wheat, just exactly what the yield was I am unable to say. I only have the total acreage and the total yield. We had in about 1300 acres, and got something over 23000 bushels. I am not absolutely positive as to the acreage, but I am as to the yield.

#### Recross Examination.

I meant to say that the average yield on our place for the season 1912, was 20 bushels, in 1911, it was very light. I think we had in 800 acres and got three or four bushels to the acre. It wasn't worth cutting. 1910, it was very light. It was no better than in 1911. I am sure. It was all cut. As a matter of fact the tenant, having his own combine and equipment, cut it all over, but the yield was very light in both these years, practically the same in 1909, 1910, and 1911. I don't think we got much, if any to exceed three or four bushels per acre in those years.

**[Testimony of L. O. Ralston, for the Plaintiffs]**

L. O. RALSTON, witness called on behalf of plaintiffs and first duly sworn testified as follows:

(Question by Mr. WILLIAMS.)

I reside at Portland, Oregon, resided previously in Gilliam County, at Olex, principally. I was in Olex and vicinity about twenty years. Lived there in 1908. Since then for the first few years I was there very nearly half the while.

I own land there in Section 16, Township 1 South, Range 22 East. It is just across the road from some of the Tobey land. I think I am generally acquainted with land values in that neighborhood, and am familiar with the land known as the Tobey Brothers' ranch. For the last 15 years I think, that kind of land has been selling from \$20 to \$25 an acre. March 1911, I think it was worth as much then as it is now. We have had some light crops, but we have had them a good many times since 1890. My opinion is that it is worth from \$20 to \$25 an acre now and was then.

**Cross Examination.**

We have had a good many light crops at different times since 1890. They have run about every ten years. They will begin to get light and the next years will begin to get heavier again. I have not kept an exact record of it, only in a general way. Living there since 1880.



(Testimony of L. O. Ralston.)

Q. Do you mean they started with pretty good crops, and then gradually get lighter and lighter for ten years, and then start in again with good crops?

A. The seasons vary in about that way, in my experience.

They have more rain here some years than they do others. It will vary along between those periods. I think there has been some land sold there for \$20.00 or \$25. an acre. I understood the Tobey Brothers sold theirs to the Columbia River Orchard Company for \$25. or \$30. I sold a 160 acres a couple months ago, about the same quality of land, and about the same distance from the railroad, about the same distance from the river, in 1 North, 21 East, it was an average piece of land. I got \$20. an acre for it. Know of no other sales like that. That piece of land was about 12 miles from the railroad. I think from Suttler's station. That was sold to Ed. Tobey, isn't paid for yet. He hasn't got his deed. He is to pay for it when the deed is given him. Ed Tobey sold his. There has been some land selling every year in the country. I don't remember any particular sale right now in the district around Olex. Land has not been selling as freely as it has. I haven't looked for any buyers. I am not very well posted as to that whether people want to sell and are looking for buyers. 1911 was a very light year. There were three or four years there, which was very light. I presume that naturally makes land hard to sell and buy-

(Testimony of L. O. Ralston.)

ers few. I have some land for sale. I hold it at \$20. It is close to the Tobey Brothers, right south of theirs.

Redirect Examination.

The land I sold to E. O. Tobey, was not improved in any way, no fences on it. It used to be fenced to itself, but I think it is in the field with the Tobey farm now with a fence on it.

[Testimony of J. A. Ward, for the Plaintiffs.]

J. A. WARD, being called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

(Questions by Mr. WILLIAMS.)

I reside in Portland, Oregon, previously resided in Gilliam County, about eight miles from Olex, also at Arlington. I was at both places. I moved down there in 1884, and left in 1903. I have been back there, not to live, three or four times. I have interests up there and go up there once in a while to look after them. I have quite a large body of land sold under contract. I am familiar with the land in the neighborhood of Shuttler's flat.

I can place an estimate on the land, that I think it is worth. I know the Tobey Brothers ranch, have been over it. During March 1911 and up to the present time I wouldn't put the value less than \$20. on any of that land that the Tobey Brothers own, at that time, at the time that I was in the country. Of course, understand that I consider that a cash value.

(Testimony of J. A. Ward.)

The Tobey Brothers ranch compared with the other land in that neighborhood, is very much the same. It is considered one of the best ranches in that entire country.

### Cross Examination.

My place is sold for half the crop. While my place was very badly farmed, there was a dispute raised over it, and one or two years it wasn't farmed at all. My place is twelve quarter sections. I am interested in the same place. Would be 1920 acres. My place is about four or five miles east, almost due east, of the Tobey ranch.

(Questions by Mr. FLEGLER.)

I think there was very little crop in 1911 of mine. I say that the entire country was very light in 1909, 1910 and 1911. There were a few places there that raised some crop. In nearly every instance where there was no crop it was more the fault of the farmer than of the land. The yield didn't amount to much, five or six bushels would be an average throughout that neighborhood, in those years, not over that. Some of it wasn't worth cutting. Some places grew up with weeds, but that I think was a great deal the fault of the farmer. Naturally it would be discouraging, not only to the owners, but to the lessees.

I will tell you exactly how I arrive at values. It may be that you will only have two or three or four light crops, only pay expenses. Now it is possible in that country to get \$20. to \$25. an acre from the

(Testimony of J. A. Ward.)

land in one crop. In 1891 I had land that netted me \$26. an acre one crop, of course we had big prices 80c or 87c and it was a wonderful years, and very often you get crops there, one crop will pay for the land at \$20. and acre. Everyone must understand that we are going to have failures in that country but they judge by the general crop for 10 or 15 years in judging the price of land. I farmed twenty odd years, and I only had one crop that didn't pay expenses, and that was in 1984 and '93, outside of that they all paid expenses, and some paid good dividends.

**[Testimony of E. O. Tobey.]**

E. O. TOBEY, being called on behalf of *witnesses*, first duly sworn testified as follows:

(Questions by Mr. WILLIAMS.)

I reside at Eugene, Oregon, principally. Previously I have resided near Olex on Shuttler's flat. I owned land on Shuttler's flat. About the latter part of March, the deal was consummated, since I owned it. I resided there 20 years. Have been there usually, since residing at Eugene, three or four times a year. I stayed there last summer three months.

Am acquainted with the ranch known as the Tobey Brothers ranch. I knew it, walked over it, rode over it hundreds of times before it was ever farmed at all. I am a brother of W. L. and F. L. Tobey.

I am familiar with the land value in that neighborhood and was familiar with them in the year 1911.



(Testimony of E. O. Tobey.)

I was familiar in a general way with the equipment that was on the Tobey Brothers' ranch, before they traded in 1911. The way I figure values there, if a acre of land, or a farm, a number of acres will produce a certain per cent, we will say seven or eight per cent, if it is on \$25., it is worth \$25., if it will raise that on \$30., it is worth \$30. That is the way I figure values. The land in Shuttler's flat and that immediate neighborhood is worth \$25. to \$30., an acre, and was worth the same in 1911 as it is now. The Tobey Brothers ranch I consider worth about \$3. an acre less than mine. Mine I have just sold my place for \$30. an acre, and I put a value on the Tobey Brothers ranch at \$27. an acre with the equipment.

Cross Examination.

(By Mr. C. E. S. WOOD.)

This is an average spring in that part of the country. The conditions are good now at the present time. I don't think as much moisture as last year. 1911 was a very bad year. Better this year than in 1911. The price is the same this year as in 1911. I don't see why it shouldn't be. One failure never discourages me. I rate the value according to the interest that is brought in. I don't figure from any one year. My land some years would run in debt, and other years would make as much as 20 per cent clear, and other years, I have made as high as 40 per cent. I take the average ever since I have been farming about

(Testimony of E. O. Tobey.)

28 years. I didn't make a profit every year. 1909 and 1911, were very bad years, there was no profit either year, in fact we run behind. Those are the only years that I haven't paid expenses since I have been farming. I have been farming the last six years about 5800 or 5900 acres, that is about 2800 or 2900 acres each year. I have that much grain each year. It is a little over half of it is my own.

The method of farming, pulverizing the top soil, and keeping mulched etc. Never have used anything but a harrow for that purpose, used horses. I sold my land in March this year, \$30., an acre. It was a trade, but the trade was as good as cash. It was for Portland property, on the east side, 7th and Belmont Streets. The lower floor and basement is used as a bakery, and the two upper floors used as apartments. It is 100x200 feet. A three story brick building. Brings in \$720. a month in gross. The taxes this year was \$735.90. Insurance whatever I am minded to carry. The building is new. Haven't written off anything yet for depreciation.

#### Redirect Examination.

I traded 3280 acres. The difference between my land and that of my brothers is that theirs is a little farther from the market, a little more what we call rough land, that is land not plowed.

[Testimony of Mrs. Jennie C. Koppen, for the  
Plaintiffs.]

MRS. JENNIE C. KOPPEN, a witness called on behalf of plaintiffs, being first duly sworn testified as follows:

(Questions by Mr. WILLIAMS.)

I reside in Wahluke, Washington. Resided there 19 years, and am a wife of F. C. Koppen, and the daughter of Mary A. Domay. I am not the only child. I have two brothers and a half sister. My homestead is in Section 10, under the Wahluke project, 155 acres a trifle over I think. I sold 80 acres to the Columbia River Orchard Company. My mother got the patent to her land in her own name. She sold it, I think, it was deeded to the Washington Orchard, Irrigation and Fruit Company.

Exhibit marked 41 for identification, handed witness. I have no recollection of that contract, but that is my signature. As I recollect it I simply made a deed to the company. The deed was made about April 22. They gave my mother bonds for her homestead, and she signed the deed herself. I think it was April 22nd, the same date as my own, 1911. Mother got \$30,000. worth of bonds for the 160 acres. They gave me \$17,000. worth for about 80 acres. The river cuts out a small corner, and we saved out two acres for our home place, probably 74 or 75 acres. They didn't figure at any price per acre, but just

(Testimony of Mrs. Jennie C. Koppen.)

said \$17,000. The town of Wahluke is situated on my homestead and was a part of the 80 acres.

I talked with Mr. DeLarm quite often as to the other lands that were owned there by the Columbia River Orchard Company or the Washington Orchard Irrigation and Fruit Company in that neighborhood. He never told me they owned any, for I knew they didn't. He told me they had a contract for half of section 16, and also a contract for Section 20. I took up a Desert claim in Section 30.

Desert Land mortgage handed to witness and signature identified as her's and her husband's covering the East half of the Southeast quarter, Northwest quarter of the Southeast quarter and Northeast quarter of the Southwest quarter of Section 30 Township 14 Range 26 East W. M., dated 16th day of September, 1909.

Witness continued, that is the description of the desert land claim in Section 30. Witness was handed a mortgage covering Desert Land Entry No. 1124, dated September 16, 1909, covering East half of the Southeast quarter, Northwest quarter of the Southeast quarter, and Southeast quarter of the Northeast quarter of Section 10 Township 14 Range 26 East, W. M. in Grant County, Washington, the signatures thereto identified by the witness. Both mortgages were handed witness and she was asked to explain how she came to sign both of the instruments, while this is the original mortgage (indicating) I had heard



(Testimony of Mrs. Jennie C. Koppen.)

that sometimes people took out a page and substituted another.

Such a thing happened to my brother one time, and I thought I would be a little smart and I signed each page of this, and made an exact copy with my name at the bottom of each page in order that I might have one just like the other one, couldn't be any dispute about it, and Miss Lofrey, the vice president of the company signed it, but I thought I would like to have the president, himself sign it, and so she said she would take it to Spokane and have him sign it, and send it back to me, and it was never found again until I saw it in the District Attorney's office last spring.

Q. Now has either one of those been altered, and if so, which one?

A. The last one that you handed me is a description of my homestead.

Q. What alteration has been made in the instrument since you originally signed it?

A. When I first signed it, the entry covered the east half of the southeast quarter, and the northwest quarter of the southeast quarter, and the northeast quarter of the southwest quarter, which was changed so the northeast of the southwest read "southeast of northeast," which would exactly fit the homestead, and from Section 30 to Section 10. The section number was changed.

Q. Now examine the note that accompanies the

(Testimony of Mrs. Jennie C. Koppen.)

second mortgage and state whether or not you signed the note.

A. No, I didn't sign that note. That isn't my signature.

Q. Then if I understand you this Desert Land Mortgage was executed in duplicate.

A. Yes, one for the company and one for me.

Q. And one of them has now been changed?

A. Yes, sir.

A. And the note that bears your signature, but wasn't written *by* you attached?

A. Yes, sir.

Q. Where did you see these two mortgages. You said you saw them some time ago.

A. Mr. McCourt showed them to me. I asked Mr. DeLarm, is he had seen anything of that copy in his papers, and he said he hadn't.

MR. WILLIAMS: I would like to have the records show that it is the same mortgage that Miss Day testified too.

MR. WOOD: What was the effect of her testimony?

MR. WILLIAMS: One of them had a forged signature.

I talked with Mr. DeLarm, in regard to the securities behind these bonds just about the time that we made the sale. He said that behind the bonds were first mortgages and deeds of different *pies* of property, and I asked him where they were, I knew they

(Testimony of Mrs. Jennie C. Koppen.)

didn't own anything except what I had sold him, and he said they were in eastern Washington, Idaho and Oregon and over the coast, and just generally everywhere around. I talked with him later in regard to the securities every time he came over I asked him about it, and he told me each time that they were all well secured. That there was 125c behind every dollar's worth of them and besides that they were guaranteed by the Washington Orchard Irrigation and Fruit Company.

Q. Now, the first time you talked with him about it, did he say anything about these water mortgages being behind the bonds?

A. No, I don't think he had any yet. No, no I know he didn't say anything about it. Told us just about the first mortgages and the deeds. He never claimed until the very last that the water mortgages had anything to do with it at all.

At the last there, I said, "Mr. DeLarm, what is behind these bonds? Is there really anything?" And he said "Yes," and I said, "Well, what is it?" and he hesitated and I said, "I want to know just what is behind the bonds?" You have talked about it and said they were good, and all. Now, what is it that is behind them?" And after a pause of a few minutes he said "The project over here."

I don't recollect that he said anything about the water mortgages, of course, he might have, I don't remember he said so, just said the project over there.

(Testimony of Mrs. Jennie C. Koppen.)

We had been talking about the pump house you know and the ditch and all that. The conversation took place in our dinning room at my home. I can't place the time exactly. It was late in the fall of 1911, late in September, or else early in October. It seems to me if you could place the time that he came over with Mr. Clapp and Mr. Sichlar and two other gentlemen were with him at that time. I think that was the time. It was late in the fall, the late peaches were ripe, I know.

The fall of 1911, he told me that he was trying to interest Mr. Clapp, in the project, to get him to put some money in it, that was Cyrus F. Clapp. They came to our house and made a little call, they didn't stop over night. I think they came in in the morning, the auto met them at the train you know, and brought them over and took them back that afternoon. The ditches are not completed yet. The digging is all done in the main ditch, but the laterals are not, neither is the flume in the main ditch.

On the north branch of the ditch you remember in the map it divides and runs up kind of like that, (indicating) in that part of the ditch there are two flumes, one will have to be 1,000 feet long, I heard the engineer in charge say, and it will in places be as much as 24 or 25 feet high, and the other one is the shorter one, that will probably be about five or six hundred feet, and it isn't quite so high as the other. Then in the other part of the ditch, the other



(Testimony of Mrs. Jennie C. Koppen.)

branch of the ditch, there is still another flume, even higher than the first one I mentioned. There have been three laterals started, none of them have been completed. The way the land lies, the ditch runs kind of on high land like that, (indicating) and there is a swale between there and the river, and they have to put in a lateral to run the south side of that swale or siphon across. They have one section partly finished, and I believe were to put in some more pipe and run it along, in fact, they can't put water on any land they have contracted for as the ditch stands now, except mine, a little part of mine, until they put in the rest of these laterals. They have never been in position to put water on any of it. Not on any land for which they have a water contract, except that little corner of mine.

I am acquainted with E. C. Kilbourne. I have seen him in my own home. I can't place the date exactly, but I think it was early in April 1911. I had a conversation with E. C. Kilbourne, in regard to whether or not he was paid for the pumping plant, with a little apology to Mr. Kilbourne for asking him such a personal question, I asked him if he had been. He said he had been paid, and not only paid, he had been paid for more than he had done, for he had still another unit to put in, to lift the water on to another level about 20 feet higher. He told me that they had turned over to him the Tobey Brothers ranch down in Oregon. He said they had traded bonds for it. I

(Testimony of Mrs. Jennie C. Koppen.)

think it was after March 1911, that he finished the pumping plant.

**[Testimony of F. L. Tobey, for the Plaintiffs.]**

F. L. TOBEY, being called on behalf of plaintiffs, being duly sworn, testified as follows:

(Questions by Mr. WILLIAMS.)

I reside at Merlin, Oregon; have resided there sixteen months. Previous to that in Portland, and previous to that in Gilliam County, Oregon. Am one of the plaintiffs in the case. My age is 42.

I went to Mr. Sherlock's office in regard to the sale of the land there, seeing an advertisement of the Northwest Exchange Company, in the papers we called there to see if we could dispose of our farm property. If they could dispose of the property for us, and we listed it with them at \$25. an acre. That was for the bare land. A little later on we went in to see if he had anything to offer or any prospects, either that, or he called us by phone, I don't remember which, and after talking a few minutes with him he asked us if we would be interested in some bonds. We told him we were willing to investigate anything, if there was any merit in it, we might consider them, so he called by phone Mr. Humphrey, to his office, and he talked to us a little while, gave us a brief outline of the Wahluke project and their bonds.

He said they had an irrigation property on the up-

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

Transcript of Record.  
(IN TWO VOLUMES.)

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His Wife, AUGUSTA M. TOBEY and  
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EDWARD C. KILBOURNE et al.,  
Appellees.

VOLUME II.  
(Pages 337 to 690, Inclusive.)

Upon Appeal from the United States District Court for  
the District of Oregon.

Filed

JAN 14 1915

F. D. Armstrong,  
Clerk.





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(Testimony of F. L. Tobey.)

per Columbia River, that they were issuing bonds, which were backed by first mortgages and sales contracts and after talking with him a short time, he claimed he didn't know all the conditions in this project and he proposed that we go to another man's office, and he took us to Mr. Hodges, for further information. Mr. Hodges office was in the Chamber of Commerce Building. Mr. Hodges, told us about the same as Mr. Humphrey, only he went into it a little more fully. I don't know that I can recall all the conversation there. He represented to us that they owned about four thousand acres at Wahluke, and they had contract for something like ten thousand acres more. He said mortgages behind the bonds were first mortgages on real estate. 125 per cent of the face value of the bonds. They had contracts to the same amount, 125 per cent of the same amount of the face value of the bonds. They got these contracts from the sale of property on the Wahluke irrigation project. I think we probably were in his office for a couple of hours. He showed us a map of the project, and I think he had some photographs there. I know he did later. I am not sure whether he had them that day or not, but I believe he did, showing work done and was being done on the ditches, photographs of a pumping plant, exterior and interior. We had several conversations with him in regard to the bonds.

We went there to see him frequently. We had a

(Testimony of F. L. Tobey.)

conversation with Mr. DeLarm, about it, after talking with Mr. Hodges. I don't know but what we went there perhaps two or three times, and he proposed sending for Mr. DeLarm, who, he said, was president. It would be impossible for me to give the dates when these various things occurred. I would say our first visit to Hodges' office, to be the last of January, or early in February 1911. Mr. Hodges sent up to Seattle, for Mr. DeLarm to come down, and we spent some time with him going over the proposition. He gave us just about the same story that the others had. He represented they had this Wahluke project, they owned some four thousand acres of land in their own name, and had contracts on something like ten thousand acres more, they had a pumping plant practically installed, and were working on the ditches at that time, had some seven or eight miles, I think, completed, he claimed. The lands they had contracts on, I understood, belonged to the Northern Pacific Railway.

We had just this one conversation with Mr. DeLarm, before the deal was consummated. He said these bonds are guaranteed by 125 per cent of the face value in first mortgages on real estate and the same amount of sales contracts. He stated the mortgages were with the trust officer George C. Hodges. I think we talked over the terms of the trade, and he made arrangements to go up to eastern Oregon; to go up to look at our farm property. We agreed upon a



(Testimony of F. L. Tobey.)

trade providing they were satisfied and their bonds stood investigation. He said he was not posted on farm property, but he had a friend in Seattle, who was familiar, and he would like to bring him along and take his judgment. The next time I saw him was at the farm with E. C. Kilbourne. I didn't go over the place with them at all myself but I saw them at the buildings; they came to the buildings shortly before noon, were looking around the place, took in all the buildings, the barns and our pumping plant, examined the stock. We were all together, Mr. DeLarm, Mr. Kilbourne and myself, and my brother. There was some talk among the four of us about the stock. Mr. Kilbourne, made a remark that we had a very nice bunch of stock, and I think in the course of the conversation, he asked in the event of a trade if the purchasing party would be allowed to select the stock to a certain number that had been agreed upon. We told him that we would reserve that privilege ourselves.

I would say they were at the house probably two hours. Most of the stock were loose in the yard at the time, they just went around thru and looked at them; went into the barns and looked over what we had worked in there, they went to the bunk houses, the men's bunk houses and looked thru there; examined the wagons, the blacksmith shop, and went on to a separate building about a quarter or three-

(Testimony of F. L. Tobey.)

eighths of a mile from the other buildings, *were* we kept the combined harvester, and looked at that.

I went from there to Olex, and came back to Portland the next morning. I saw Mr. DeLarm in Portland.

We drew up a contract for the place, an agreement. The consideration was \$120,000. in bonds. After that my brother made a trip to Seattle, to investigate the bonds. We looked them up, their record as far as we knew how. I don't know what he did in Seattle, except as he told me. I wasn't with him.

That contract wasn't carried out. We entered into another agreement with them later. Mr. DeLarm was in Portland at the time the second contract was entered into. We relied upon in entering into the contract—our own investigations, and principally to what the company had told us, our acquaintance with them; we took them to (*be*) honest reliable men and depended largely on their recommendations. I made no investigations personally, the investigations were made by my brother principally. We believed the representations made by Mr. DeLarm and Mr. Hodges. When the deeds were made out there was present Mr. DeLarm, Mr. Hodges, Mr. Brazell, and I think E. C. Kilbourne was there. They were made to E. C. Kilbourne, at the request of Mr. DeLarm. I don't think there was anything said about that until after we had agreed on the trade, and it came to

(Testimony of F. L. Tobey.)

the question of making out the papers. I can't say positively when that request to make out the deeds to E. C. Kilbourne, was made; I couldn't recollect. I knew of it when the deeds were made. I think he was in town at that time. I saw him the next day after the deeds were made; I think it was the next day; I won't be positive. The deeds after they were made were placed in escrow at the Hartman-Thompson Bank. It was for one of two reasons, I am not positive of which; it was either because there were some defects in the abstract, which Mr. Kilbourne wanted corrected, or it was pending a loan Mr. DeLarm, was to make us for \$3,000., which he wasn't prepared to turn over to us at that time. I can't tell the exact date the deeds were delivered to Mr. Kilbourne, it was something like ten days later, I think that they were out of escrow. I couldn't state as to whom they were delivered to. I don't know whether C. A. Kilbourne was in town at the time of the delivery of the deeds. There were approximately 4350 acres in the place, just a fraction of an acre less. We had been farming that place eight years.

I know the value of real estate in that neighborhood generally, I think. The value of land of that character in that neighborhood, in March 1911, was worth \$20. to \$25. an acre. We valued ours at \$25 with the equipment on the place. The extra \$1000. in the consideration of \$141,000., was part payment

(Testimony of F. L. Tobey.)

for the grain we had on hand, and the wood, groceries in the house and fuel oil and such things as that.

Mr. DeLarm, represented, I think, there was something like \$300,000. bonds outstanding at that time. We didn't employ an attorney to investigate these bonds, and never went up to Wahluke to see the plant, and never saw any of the securities. Mr. Hodges, said they were in a safe, I believe it was at the Seward Hotel, where he was stopping. I believed the representations made to us by Mr. DeLarm, and relied upon them. The state of cultivation of the place was very good at that time. In 1909, I believe was a fairly good crop. 1910 was very light. In 1909, I don't remember positively, I think our grain went some 12 or 14 bushels to the acre. In the fall of 1908, I think it was, I counted the sacks. The first season we had it. It ran, if my memory serves me right, there was something over 11,000. sacks. We generally figure about  $2\frac{1}{4}$  bushels to the sack. They harvested something like 1700 acres, that year. The method of cultivation has a great deal to do with it. To produce the best crops there, the work wants to be done at the proper season, done well, and the land thoroughly cultivated to conserve the moisture. That is true of any farming community, to a certain extent, more so there, than elsewhere I think. They were just beginning to adapt that method at that time. I was on the place during the time Mr. Chandler, had it, in fact I drove a team for him a few



(Testimony of F. L. Tobey.)

days to help him out when he was short handed. The year 1908, the year I counted the sacks. He turned the ranch over to Mr. Wade, because he was pretty heavily in debt to Mr. Wade, and glad to get out of it. Mr. Wade, gave up the place, he said he had more business than he could handle. He was a merchant at Olex, and also had several farms on his hand; said he had to let some of them go, didn't have time to devote to all of them. Mr. Wade told us he didn't make expenses one year, but I think he did the other. 1909 We didn't sell anything out of the place, that was a very short year; poorest crop we ever raised. 1910 It paid us something. I don't know now how much. I can tell approximately, I would say we got some five or six thousand dollars off the place that year. We got half of the product.

Cross Examination.

(By Mr. C. E. S. WOOD.)

1908, the sacks were piled in the field, and I went to them and counted them. The next year we didn't get enough crop so that we sold anything out of it, we used it all for feed and seed purposes. We were getting half the crop in the year 1910. As near as I can remember we got some five or six thousand dollars, but I am not positive, that was our half.

Q. What induced you to rely upon the representations of Hodges and DeLarm, and at the same time send your brother over to Seattle, to make an investigation? In one breath, you say that you relied



(Testimony of F. L. Tobey.)

upon the investigations you made, and you evidently did make an investigation; in another breath, you say you relied upon the representations of these men there.

A. We relied on both our investigations and their word.

Q. You endeavored to make a thorough investigation, did you?

A. We did, to the best of our ability, we thought.

Q. You have been pretty careful business men all your lives in business?

A. As far as we knew how, I guess.

Q. What did DeLarm say when he said that he wanted the deed made out to E. C Kilbourne? Give as near as you can the words he used and the reason he gave.

A. Why he said he wanted to make the deed to Mr. E. C. Kilbourne he owed him some on some of the work installing the pumping plant for him on his irrigation project and he wanted to turn the place over in settlement.

Q. He was taking this method of making settlement.

A. Yes, sir.

Mr. Brazell, I believe drew the deeds, I didn't see them drawn. They were already prepared when we went to Mr. Hodges office. I was never in Mr. Brazell's office. The contract made in February, was made the day it bears date. I have no way of fixing

(Testimony of F. L. Tobey.)

the date, that they *cam* up to the ranch for investigation. I think my brother went to Seattle, within two or three days following that. There is no way that I can recall the very day of the month or the day of the week. I signed this first contract in Mr. Hodges' office. There were present Mr. Hodges, Mr. DeLarm, my brother and myself. I cannot recall who else was there. I couldn't tell whether it was morning or afternoon, my memory is that it was the next day after they came to look at the ranch. I think they came back to Portland, from the ranch in the afternoon, took the afternoon train out of Arlington, and I followed them the next morning. I can't say whether we executed the contract the same day that I got in from Arlington, though I think I did. I am now referring to the first contract.

The time we first talked with Mr. Sherlock, I think was in the latter part of January. I would think it was perhaps some week or ten days later when he introduced us to Mr. Humphrey, which would be early in February, and we saw Mr. Hodges, almost immediately. I don't know whether Mr. Hodges, told us he was trust officer that day or not, I couldn't say how long it was until the next time we saw him, but we saw him several times. I think the period was less than a week. The company he named that he was acting as trust officer for was Oregon & Washington Trust Company, that he styled it.

Adjourned for the day.

(Testimony of F. L. Tobey.)

Friday, May 16, 1913, 10 a. m.

Certified copy of deed from Mary A. Domay, to the Washington, Orchard Irrigation and Fruit Company, introduced marked "Plaintiffs' Exhibit 134."

F. L. TOBEY, resumed the stand.

Cross Examination Continued.

I base my estimate of the value of farming land in that region, on what the land will earn, and the price land is being sold at. I never kept any record of it, so I could not answer that intelligently, what it would earn on an average, say at seven per cent. I don't know that I can recall any sales that were made early in 1911.

Q. Do you know that soon after they took possession that the Kilbournes bought adjoining land for \$10.

A. I didn't know anything about it.

Q. It is a fact, though, that a good many of the smaller farmers sold out and moved away from that district, isn't?

A. There have been more or less for years past.

Q. Isn't this a fact, that land has to be farmed alternate years, that is, you have got to accumulate the moisture over a year?

A. That is the most successful way.

Q. And its got to be farmed the dry farming system of perpetual cultivation, and keeping a mulch of powdered soil on top to retain the moisture?

A. To make it pay the best interest.

(Testimony of F. L. Tobey.)

Q. And to do that effectively, requires considerable apparatus either in the way of stock or machinery, and the overhead charges are such that you have got to have a large quantity of land to let the half lie idle in the alternate years, and to warrant the expenditure of money in stock, and machinery, and it is necessary in order to make a good business of it, you have to have very large ranches, isn't that so?

A. Not necessarily. A man can handle the same quantity of land profitably there.

Lots of them living there on half a section, making a living.

Q. How do you know they are making a living?

A. They live.

Q. How do you know they are not in debt?

N. Nobody starved to death there yet that I know of. I don't know anybody's private affairs of course.

Redirect Examination.

(Mr. WILLIAMS.)

My brother Fred's farm contains 2800 acres I believe. When I went there I didn't have a dollar to my name. First property I gave a note to my brother Fred. We have made our *property* right there in the country, farming principally. When we traded off the place, myself and brother owed something like \$6,00. We had acquired all that property up there. I know how much my brother Ed had when he went there. I know pretty well Ed had about \$1200, I think when he started farming. Everything



(Testimony of F. L. Tobey.)

he has beyond that he has made since we started farming off his place. Fred was the same way.

Q. During the course of the years those farms are profitable?

A. They have been.

I didn't make any investigations of these bonds personally, my brother did a little. We relied principally upon the recommendation given us thru DeLarm and Hodges. We were in charge of the place ourselves. Mr. Wade had given it up at that time. We had in charge a man by the name of Jones. I don't know whether Mr. Kilbourne, talked with Mr. Jones, or not. Mr. DeLarm took an interest in the investigation of the place in a casual way, not particularly so, Mr. Kilbourne seemed to be the most directly interested. I think the bonds were in the office here in Portland, when we were there to make out the deed. My brother attended to the counting of the bonds I didn't personally. I was there at the time he counted them I think Mr. Kilbourne was there at the time, I am not positive *a* to that. When we traded the farm off, I personally had an equity in a home here in Portland, but not enough to cover this indebtedness. Trading off this farm left us worse than broke. Property here I deeded to some of my creditors in payment of some of my debts.

Recross Examination.

(Mr. C. E. S. WOOD.)

My brother Fred's land was down on Shuttler's

(Testimony of F. L. Tobey.)

flat. It is as good as any I guess. My brother Fred has never sold it. The Shuttler's flat land perhaps would bring a little more.

Q. Isn't there better crop, deeper soil, down on that flat, and more moisture?

A. No, sir.

Q. Just as deep soil on the hill land above?

A. Yes, sir, as far as I know.

Q. Just as much moisture?

A. No difference in the moisture.

Q. You said yesterday that your brother went over to Seattle and made full investigation, or made investigation, in accordance with the agreement that he was to have a chance to do that, and you relied on this investigation. Now, this morning you come in and say, well you relied a little on that but you depended principally on the statements of DeLarm and others. Have you been talking with your attorneys over night on that particular point?

A. I don't think I have.

Q. Well, you ought to know.

A. I didn't make any different statement than I made yesterday as far as I remember.

Q. Yes, you have.

A. Didn't I say yesterday that I relied on what DeLarm and the others told us, with our investigation along with our investigations?

Q. Well, the record will speak for itself. The question I am now asking is whether you have dis-

(Testimony of F. L. Tobey.)

cussed that point with your attorneys since you were on the stand yesterday.

A. I spoke of it to my brother.

Q. But not to your attorneys?

A. No, not particularly that.

Q. You have discussed the case and your testimony, have you?

A. It has been spoken of.

Q. Since you were on the stand yesterday, I mean?

A. Yes, sir.

Q. When I say spoke of it to your attorneys, I don't mean whether you opened the subject; I mean whether you discussed it at all. Did they speak to you about it? I don't care who began it.

A. There was more or less discussion of what was the evidence yesterday in various ways.

Q. Was this particular point discussed, about what you relied upon?

A. I don't know as it was.

Q. Don't know as it was?

A. May have been; might have been.

I didn't personally count the bonds at the time the bonds were exchanged for the deeds. I sat by while my brother was counting them—watched. Most assuredly I took some interest in the transaction.

#### Redirect Examination.

1910, we had a trade for the place practically completed. The valuation was \$120,000., cash valuation.

(Testimony of F. L. Tobey.)

It didn't go thru because the other man wasn't able to deliver his property.

Recross Examination.

That was a trade, yes, sir. Cash valuation, not any fictitious valuation.

It was admitted at this time that the bonds filed in Court are the bonds that were traded for the Tobey ranch. Later the Tobeys exchanged \$60,000 of bonds for others of smaller denominations. The coupons cut off the bonds and delivered to Mr. Woodcock, were not to be found. The number of \$5,000. original bonds were Serial Numbers 3413 to 3425, and 3490 to 3494, February bonds Numbered 866 to 895 par value \$100 each, issue as the date of February 1, 1911. These February bonds were the first issue of 7 per cent bonds and were part of the original consideration given to the Tobeys.

[Testimony of A. J. Biehl, for the Plaintiffs.]

A. J. BIEHL, being witness called on behalf of plaintiffs, first duly sworn, testified as follows:

(Questions by Mr. WOODCOCK.)

I was connected with the Columbia River Orchard Company, and other corporations, that were run by Mr. DeLarm Humphreys and others. I was secretary.

The transaction for the Tobey Brothers ranch was carried on entirely by Mr. DeLarm, I don't know very much about it, though I heard a great deal about



(Testimony of A. J. Biehl.)

it. I am acquainted with Mr. Kilbourne, E. C. Kilbourne, known as Dr. Kilbourne. The transaction was closed up sometime during the spring, I don't recall the dates. I had no conversation with Dr. Kilbourne, E. C. Kilbourne, about it, only in a general way. I went into Dr. Kilbourne's office several times. I was in there all the time, looking up matters, we were in debt to them. Dr. Kilbourne's office was in the Epler Block, in Seattle. They never discussed the matter in detail with me, because I wasn't the one who was transacting the business with them. Mr. DeLarm attended to their affairs entirely. I remember going in a number of times to adjust real estate deals of other kinds we had up as collateral to secure them on their debt. It was talked about, there was some little discussion about it. They thought it was a good thing (referring to Tobey deal). A short time before he came down, (referring to DeLarm), I went to look up some collateral down there, DeLarm wanted me to go down and attend to it, a list, and I mentioned the ranch, said we had a deal on it, or DeLarm had, and it would be a very good thing, and he said yes, he thought it would, it would clean up the debts and would make the bonds valuable we traded for the ranch. I mentioned to Dr. Kilbourne, that it would be a good thing to get the ranch if we could and Dr. Kilbourne, thought it would and I think I made the statement that it would make the very bonds valuable for which the ranch was traded.

(Testimony of A. J. Biehl.)

He wasn't particularly interested in our transactions except that he was willing to take the ranch. The work up at Wahluke was shut down until we could make an adjustment with them, pay them something on account. We were carrying out the work on the canal at that time and we were hard up, that took all the money we could raise for the canals. They were our creditors, they wouldn't continue until *the* got some money.

Cross Examination.

The conversation, was well Mr. DeLarm, was talking to Mr. Hodges, in *Portlan*, I believe about the trade.

Q. Now, you say that Mr. Kilbourne expressed a willingness to take the ranch in payment of their debt?

A. Yes, sir.

Q. Or some such settlement?

A. Very glad to get it.

Q. That must have been after Mr. Kilbourne had seen the ranch and knew what it was, wasn't it?

A. No, I think that was a little time beforem while we were just talking about getting it.

Q. He then expressed himself willing to take it before he knew what it was?

A. No, not exactly that way; that is a little too direct. Of course he wanted to see it first; there is no question about that; he wasn't going to take it until he had seen it.

(Testimony of A. J. Biehl.)

Q. You couldn't fix the date in any way?

A. No, I couldn't; I couldn't fix that time. It was, Oh, I presume a month or two weeks ahead of the time when they looked at it, but you see I wasn't carrying on the transaction and I really didn't know. I can't fix the date in my mind at all.

Q. What was the number of bonds outstanding at that time?

A. I wouldn't know without looking at the records; there were no serial numbers taken.

I didn't keep the record of the bonds, they were kept in the other end of the office entirely. The stenographer kept them and Mr. DeLarm O. K. them. We didn't sell bonds, we just traded. There were \$59,000 of bonds put out while the trust was in the hands of the Washington Trust & Savings Company. I remember I was told so. I didn't check them over. The first 7 per cent bonds were called the February 7 per cent bonds, and were not issued until February 1911. The only other outstanding bonds, before they were put out were these \$59,000. I don't know how many of the February bonds were out in March 1911, without looking right thru the records and things of that sort.

Q. Well, would you know this: That issue being put out February 25, 1911, and this transaction with the Tobey's occurring early in March, 1911, were the bonds that were paid with, the first of that issue that was issued?

(Testimony of A. J. Biehl.)

A. Must have been very close to it because we could hardly have traded many bonds in that month, within thirty days after they were issued.

Q. And you didn't sell any for cash?

A. I don't recall a single bond, never heard of a bond being sold for cash except the brokers sold for cash to each other, after they got them. This Tobey business was the largest trade we made.

Q. You say you had some sort of a vague conversation with Dr. Kilbourne to take over, or about taking over the Tobey ranch.

A. Yes, I think was something said.

MR. ERSKINE WOOD: And we are trying to fix about when that was. Did I understand you to say you thought that was before he had seen the ranch?

A. Yes, I think it was; perhaps a couple of weeks before. I don't know whether the bonds that we traded were the first of the issue. I was not the trader, but they must have been very close to the first. The conversation with Dr. Kilbourne, I think was before he had seen the ranch, perhaps a couple of weeks before.

Q. Now, wasn't there some discussion as to whether the Kilbournes would take the ranch in settlement of the work they had done, or in settlement for that work, and in consideration for their promise to go ahead and complete the job? In other words wasn't there considerable discussion as to how much they would allow on the ranch?



(Testimony of A. J. Biehl.)

A. Yes, no doubt about that; I heard of that a great deal.

Q. Wasn't that after Dr. Kilbourne had seen the ranch?

A. Yes, sir I am inclined to think that was after, that discussion was after.

Q. Wasn't that the only time you went?

A. I went down to see Dr. Kilbourne, at any time. I went down to see him about a transaction when DeLarm didn't have time. He had all the transactions with the company. DeLarm done a great deal at that time because we owed them money. We discussed it just in an informal way before that time. They heard that there was an offer on for a ranch down in Oregon, and I don't know that they specified, only as to size, a very large ranch 4500 acres or something of that sort.

Q. How did they hear that this trade was on?

A. Why, DeLarm told them, he told all his deals for two weeks in advance of making them, sometimes he made them, sometimes he didn't.

Q. Now I persist in this because the Kilbournes are very positive that the only time you ever came to their office and discussed this Tobey business at all was after the deal was practically closed, and it was simply a question of how much they would allow for the ranch; whether they would take it in full settlement and agree to go ahead and complete the job, or just how much they would allow; they are quite posi-

(Testimony of A. J. Biehl.)

tive in that, and I want to know whether you still persist.

A. I want to be positive too, you know. I don't want to make any mistake about it. While I am satisfied that—I am satisfied that I had a conversation with the doctor before he looked at the ranch. Now, what stage the deal was in at that time, I don't know.

Q. But you didn't know anything about the deal then?

A. No, I didn't know what stage the deal was in at that time.

Q. So there was nothing said about his taking it over?

A. Yes, yes, it was a very good thing.

Q. At that time?

A. No, he didn't talk to me about those things; he didn't go into as to whether he was going in or not; that was DeLarm; he was the head of the firm.

MR. C. E. S. WOOD: I would like to ask one question: This talk with De. Kilbourne, these talks of yours, were they in the nature of negotiations with them, and you acting for the company?

A. No.

MR. WOOD: Just chats?

A. That is all.

MR. WOOD: Just casual chats?

A. *Os*, yes, not negotiations.

(Testimony of A. J. Biehl.)

Redirect Examination.

(Mr. WOODCOCK.)

Q. I would like to ask you Mr. Biehl, whether you ever offered the Kilbournes bonds for their property?

A. Oh, yes, they couldn't consider bonds. They needed cash for their business. They were not bankable at that time.

Q. What is the fact, in your negotiations with the Kilbournes whether the value of the bonds was discussed, and whether they were willing to take the bonds or wanted something else?

A. No, outside of the fact that they couldn't use them at their bank, I don't think there was anything definite ever said.

Q. Now, in dealing with the Kilbournes, what is the fact, as to your company having to turn property and everything you could get hold of over to them to secure them in their pay? Other property outside of the Tobey ranch?

A. Well, we didn't turn everything we could get to them, they demanded security because they were pressed for money too like we were.

Q. Most of the business was done thru Dr. Kilbourne, wasn't it?

A. Yes, as I recall it, I think so; Dr. Kilbourne was the one that attended to the business.

Q. Now, what is the fact as to his taking quite an interest in his business, in your negotiations, and

(Testimony of A. J. Biehl.)

one way and another, in the way of getting land, etc.?

MR. WOOD: Pretty leading I must say, but go on.

Q. Well, I don't know how to ask it in any other way.

A. I don't quite understand; what interest he had in our business?

Q. I say what is the fact about Dr. Kilbourne being—negotiating with your company, as far as you know, in reference to securing funds, etc., to carry on the business?

A. For us for our concern?

Q. Yes.

MR. ERSKINE WOOD: You mean negotiating on behalf of his concern, as his concern's agent?

MR. WOODCOCK: Yes, sir, that is just what I am asking, yes, sir.

A. Oh, I don't—I hardly know how to answer that question. I don't think I quite understand.

Q. I will ask it in another way.

A. Yes.

Q. Did you secure other property besides the Tobey ranch?

A. Oh yes; yes we had traded for other properties.

Q. And what part did he take in it one way and another?

A. I don't recall any more that he took outside



(Testimony of A. J. Biehl.)

that he was directly interested in; if there were other properties; perhaps may have helped to negotiate a loan on a piece of property, in fact I think he did negotiate a loan; that was for his own business interest, to pay himself.

Q. What would you say as to his knowledge and familiarity with the conditions of the company, and how it was doing its business at about the time the Tobey deal was made?

A. Well, he would be pretty well posted; of course we were hard pressed; that is while the deal was being made; that is for cash, actual cash, we were getting in properties.

Q. Did they know your financial condition at the time the Tobey deal was made—at that time?

A. Oh, undoubtedly, they knew we were hard up.

MR. ERSKINE WOOD: I think we have admitted in our answer, if we haven't we will admit it now, that the Kilbournes shut down in 1910, after doing \$43,000. worth of work, because they couldn't get any money out of DeLarm and Biehl. We admit that.

#### Recross Examination.

(C. E. S. WOOD.)

Q. The Kilbournes weren't in your company, any of them, were they?

A. No.

Q. As stockholder or director?

(Testimony of A. J. Biehl.)

A. No.

Q. They were familiar with all Mr. DeLarm's negotiations and inside dealings?

A. No one was I have found out now.

Q. The Kilbournes weren't?

A. No.

Q. They were simply the constructing engineers, and you had got in debt to them?

A. That is true.

**[Testimony of Jay Bowerman, for the Plaintiffs.]**

JAY BOWERMAN, a witness called on behalf of plaintiffs being first duly sworn testified as follows:

(Questions by Mr. WILLIAMS.)

I reside in Portland. Occupation, attorney. Resided previous to coming to Portland, at Condon, Gilliam County, am familiar in a general way only with the land around Shuttler's flat near Olex. Am not intimately acquainted with them. *on* Own some land in that neighborhood, and have an interest in some. I was attorney for a school fund there for about twelve years. I loaned money all that time. I loaned quite a lot of money in there, that is some, not such a large amount, probably 12 or 15 loans I should think in that neighborhood.

I know the Tobey Brothers ranch in a general way. I think I loaned some money on a piece that belonged to Henry Knott, at one time. I think that was a part

(Testimony of Jay Bowerman.)

of this place. About three-quarters of a section, as I recall it.

Good wheat land in there in my opinion would be worth at that time \$20. or \$25. an acre. I mean by that first class land. There is good, a medium, and then land that is hardly worth anything. In that country north of Rock Creek, some of it is very light, and some of it is first class. I don't think the Tobey ranch is as good a piece, but I consider the Tobey ranch worth \$20. an acre, cash value. Some of that land down there is kept in good shape, and some allowed to grow up with weeds. You take land kept in good shape and the weeds properly cultivated it is worth three to five dollars an acre more than improperly, because you loose that income, and it takes time and money to keep it in shape. My understanding of the Tobey ranch is it was well farmed; that is what I heard. I don't claim an intimate knowledge of the Tobey ranch. I just know something about it, by going by it there.

Cross Examination.

Q. You would like to believe that land up there was worth \$50. an acre if you could, wouldn't you?

A. Yes, I wish it was, yes I wish it was Judge.

**[Testimony of C. E. Sox, for the Plaintiffs.]**

C. E. SOX, witness called on behalf of plaintiffs. being first duly sworn testified as follows:

(Questions by Mr. WILLIAMS.)

I reside at Albany, am an attorney; have been practicing law nearly fifteen years.

Know George C. Hodges, had occasion to visit his office with reference to the bonds and securities behind them of the Columbia River Orchard Company. It was during the month of April, 1911. Some of my clients were solicited to exchange timber land in Lane and Lincoln counties, I believe for the bonds, of the Columbia River Orchard Company, and at their request I came to Portland, and called on Mr. Hodges at his office and discussed with him these bonds and the securities behind them. I asked to see the securities on my first visit. I didn't see them, Mr. Hodges, he either said they were in Seattle, or were locked up in a safe deposit vault where he couldn't get at them at that time, but later at their request I again came to Portland in June 1911. It was during the Rose Show, and at that time I was shown some water mortgage and also a trust agreement, under which the Oregon & Washington Company held the securities. Water mortgages was all that I saw. They told me they had contracts for land and water rights, but I didn't see any of these. They told me at that time there was \$425,000. bonds outstanding; that was in April. They told me at that



(Testimony of C. E. Sox.)

time that they owned six sections of land, that the odd sections in that project belonged to the Northern Pacific Railroad Company, and that the rest were railroad lands or government lands that were subject to location under the Desert Land Act.

I was shown a statement of their assets and liabilities at that time, of which I made a copy. Witness produces copy. Those items I discussed with Mr. Hodges and Mr. DeLarm also. I met Mr. DeLarm, in the office in June. That statement of assets and liabilities is a correct copy. I discussed those items with Mr. Hodges at that time, asking him what the various items represented, and he assured me that that was a fair statement of the condition of the company, at that time.

April 1911, discussed with him the bonds outstanding. It is mentioned in the memorandum at the foot of the statement that there were \$425,000 bonds outstanding. I put that memorandum upon it. That memorandum was made during the month of April, sometime between the 20th and 28th day of April.

Statement introduced marked "Plaintiffs' Exhibit 134 $\frac{1}{2}$ ."

The number of the bonds were then given in evidence as follows: The numbers are: \$100.00 bonds 2001 and 2010 inclusive, making \$1000.00; 3427, \$5000.00. No. 2011 to 2020, \$100. each \$1000.00. Bonds No. 3401 to 3426, \$5000.00 each, \$130,000. with the \$3000 of \$100.00 bonds makes the \$140,000.00.

Plaintiffs rest.

**[Testimony of E. C. Kilbourne, for the  
Defendants.]**

E. C. KILBOURNE, one of the defendants, called in his own behalf, being first duly sworn, testified as follows:

(Questions by Mr. C. E. S. WOOD.)

I am one of the defendants in this case. My relation to co-defendant C. A. Kilbourne, quite distantly related, perhaps a fifth or sixth cousin.

At the present time I am farmer in Gilliam County, near Olex. The Tobey lands is a part of the land I am farming.

In 1910, my business was engineer and machinery merchant. I was vice president and general manager of the Kilbourne & Clarke Company. That was a corporation under the laws of Washington. Business of constructing power, light, ventilating and irrigating plants, and the sale of electrical machinery and allied supplies. I had made a study of soils, irrigation land opportunities. I had charge of that department particularly in our company. Have given attention to lands in relation to orchards, suitable soil, suitable location etc. Had property of this kind of my own fifteen miles north of Wenatchee on the Columbia River, at Arondo, in the Wenatchee Reclamation district. 60 acres of land on what is called Arondo flat lying about 125 of 183 feet above the Columbia River of which 24 acres of it was in orchard, which we planted ourselves.

(Testimony of E. C. Kilbourne.)

First came in connection with DeLarm and his orchard company in January 1910. I first met him in his office in the Henry Building, in Seattle, Washington.

During my absence on one of the engineering trips one of our engineers had secured a contract from DeLarm and Biehl for the construction of this pumping plant. The contract had been drafted in our office, by our chief engineer, Mr. Simpson, but had not been executed. I went ahead with the draft and drew up the contract, and went up there to the office of DeLarm & Biehl, in the Henry Building, to have it executed by the officers of the Columbia River Orchard Company—Orchards Company, whatever it is.

Contract was produced and witness asked to state what he did under it at that time. Mr. C. A. Kilbourne, was absent in the east, he was president and treasurer. He had charge of the financial end of the business and the accounting department. I had charge of the operating and engineering end of the business. Upon his return,—after the signing of the contract which was on January 18, 1910, our chief engineer Mr. Simpson, sent one of our assistants Mr. Collins, over on the property at Wahluke, to make the surveys necessary for the pumping station and upon Mr. C. A. Kilbourne's arrival from the east, which occurred a few days later we both went to the office of DeLarm & Biehl, and asked for a statement of their financial resources, that we might

(Testimony of E. C. Kilbourne.)

know upon what to depend. This was right along after the 18th of January, within a week, in 1910. The contract refers to the pumping plant, not the ditches. At that meeting Mr. DeLarm, went over verbally his resources, which he said at that time consisted of desert land water mortgages, chiefly; a tract of land, 40 acres, known as the townsite of Wahluke; and 320 acre piece of school land, which they had under contract to purchase from the State. I think at that time, that was all they said of land that they owned, but that they had these water mortgages, and he stated in a day or so he would prepare a written statement, which he would furnish, which he did later to C. A. Kilbourne. I haven't got that statement, I don't know what became of it Mr. Kilbourne had it in his pocket until it was pretty nearly worn out. I don't know what he did with it. We proceeded immediately with the drafting of plans, and from that on to the construction of the plant. We were, I should say a month or six weeks before we really got into the work, and then the Columbia River began to rise, unusually early. The usual rise occurs in June or July, this occurred in April, and we were obliged to rush work night and day, and we had to go up to one of the farmers in the neighborhood and get 2000 sacks to fill with sand in order to make cofferdams to keep the water out. We had two pumps to keep the water out of the excavations, but that wasn't sufficient, and we sent to Cohasset,



(Testimony of E. C. Kilbourne.)

to another irrigation plant, we were sonstructing about 25 miles up the river and hauled down a big 25 Horse power gasoline engine and seven inch pump to add to the other two pumps in order to keep the water out. With three pumps we were able to keep the water down and go ahead with the work, but we had to keep the work going night and day in order to keep the water back. We practically completed this work in July of 1910. We kept men employed there doing little things, one thing and another, and shut down completely in September, except for a watchman and a man to look after matters down there, and also to keep our lien rights open.

Contract of January 18, 1910, with the Kilbourne & Clarke Company, identified, introduced in evidence as Defendants' Exhibit "F".

Paper dated May 18, 1910, between the same companies, Columbia River Orchard Company and Kilbourne Clarke Company, and identified as an amendment to the original contract.

WITNESS: This is an amendment of the original contract changing the estimated price from \$40,000. to \$50,000. and changing the terms of our compensation from 10% to a fixed price or \$10,000., or not less than 25%. The reason for this supplemental contract was the unforeseen difficulties, due principally to the rise in the Columbia River, these difficulties made the cost run up enormously, more than estimated; also the condition of the gravel was such

(Testimony of E. C. Kilbourne.)

that it cost four times as much as would ordinarily be expected to handle anything of that kind. It was just like mush when wet, and had to pour in cement to hold it.

Supplemental contract introduced, Defendants' Exhibit "G."

Witness shown a paper dated February 17, 1910, between Puget Sound Bridge and Dredging Company and the Kilbourne-Clarke Company—

WITNESS: This is a contract that we as engineers for the Columbia River Orchards Company made with the Puget Sound Bridge and Dredging Company, who were just finishing up a bridge across the Columbia River, near Pasco, for the North Coast Railroad Company. They had a large amount of machinery and plant just becoming idle, and we were anxious to start work in a hurry, therefore, our chief engineer, who was a personal friend of Mr. Dyer, the manager of the Bridge & Dredging Company, made arrangements with them to take their machinery from down the river about 50 miles, and put it on the ground immediately and go ahead and take the contract for excavation and pump building. That is the contract with them.

Introduced, Defendants Exhibit "H".

Q. Just, state, as an ultimate result how much you were left owing the Puget Sound Bridge & Dredging Company?

A. We were owing them at one time a little bit

(Testimony of E. C. Kilbourne.)

under \$25,000. It has since been reduced to \$19,000. then it ran up again with attorneys fees etc., to \$22,000. two or three hundred. on January 26, 1912. In March and April, 1911, we started work again and were finishing off a little piece of the intake from the river to the plant. That was one of the most expensive pieces of work there was in the whole proposition. It was under the level of the Columbia River at all times. It was a canal big enough, for a man to walk upright in. I have forgotten the size.

That was only a part of it. There was installing all of the pipes, suction pipes, and big discharge pipes, big cast-iron pipes, some of those 36 or 40 inches in diameter; the installation of all the machinery, the overhead crane that handled the machinery, the discharge pipe, which is a 4 foot pipe running from the pumping plant up about 700 feet to the ditch. This was a wood stave pipe. That is practically all of it. The additional cost was a little under \$17,000. This was after we came to an agreement with DeLarm to take the Tobey ranch. We had shut down work for lack of funds. We called in September 1910. They were *they* owing us then \$43,000 plus. We were owing the Bridge & Dredging Company about \$24,000.

Witness was asked to state in detail the first connection *thru* he had through DeLarm or in any way with the Tobey land.

A. Mr. DeLarm, came into my office in the Epler

(Testimony of E. C. Kilbourne.)

building, in the latter part of February, 1911, stating that he had another irrigation scheme, and that this project was a fine one in that it would be a gravity proposition, and was in a fine district, and said that he would like to, have me go down and look it over, and see if it was a good, feasible project, from an engineering point of view, and also particularly as to whether I thought that soil and land would be suitable for fruit raising, as he knew of no fruit being raised in that vicinity. I asked him when he wanted to go, and I am under the impression that he wanted me to start that very night. Well I said, "What do you want to take on this other proposition for, until you complete the one that you are now under—have now under way?" Well, he said, "This is a better one in many prospects". He says, "down at the Wahluke project, we are paying a hundred dollars an acre for all land, and then have to pump water on it besides". He says, "This we can get all the land in the vicinity we want for under \$25. an acre." He says, "I have about five thousand acres now that I have contracted the purchase for, and it appeals to me as a splendid proposition, because we can get all the land we need there for one quarter of what we have to pay down at Wahluke".

Q. Let me interrupt you there to call your attention to the fact, and ask if you are sure of it. He



(Testimony of E. C. Kilbourne.)

said he had some four or five thousand acres already contracted, did he?

A. Yes, sir.

Q. Go on.

A. The result was that I hurriedly closed up all the affairs—oh, I said to him, “I will go down and take a look at it, if you will pay all the expenses” which he readily agreed to do. I hurriedly closed up all the affairs I had and took the train that night.

Q. With DeLarm?

A. With DeLarm, at about 11 o'clock, and he bought the tickets and everything, and we came down, and the next morning when we got to Portland, he took me to the Seward Hotel, and we had breakfast there. During the day we met—in fact I was in his—in the office of the Puget Sound Realty Company, in the Chamber of Commerce Building when he called up Mr. Tobey, by phone, and made arrangements with him to go up on the evening train to see the property. I remember his discussing over the phone with him whether we would take the seven o'clock train, or a later train, and they finally concluded to take the later train, which we did, and we met Mr. Tobey at the station, and he introduced me to Mr. Tobey, saying “Mr. Tobey, this is Dr. Kilbourne, our engineer on our Wahluke project. I am taking him along, as he is an expert on the irrigation question, and also an expert on land and soil. I would like to have him see the ranch.” We

(Testimony of E. C. Kilbourne.)

took the train and I immediately went to bed to get a little sleep, and got off at between one and two o'clock at Arlington. I went to bed again there at the hotel, leaving a call not to awaken me till just before breakfast time. Told them I could dress in fifteen minutes. We took breakfast, and soon after breakfast, Mr. Tobey, had secured a team, and we got into the team, Mr. Tobey, Mr. DeLarm and myself, and drove to the ranch. I remember of driving, turning off the road, and driving in through a fence that was taken down, and Mr. Tobey, calling attention to a high mountain on the ranch, which he called Mount Pelee. We drove in that way. We drove over, pretty well over the west end, west half of the ranch, and arrived at the farm house, between one and two, just after the men had gotten through dinner, and they prepared a meal for us of which I ate only about crackers, the only thing I saw fit to eat there. Then we sat around there about two hours, to let the horses rest and to eat; had been a pretty hard drive, twenty, probably thirty miles all together, including what we drove around the ranch, from Arlington. We, oh, I should judge, along about two o'clock, or half past, we hooked up again, and drove over the *eady* part of the ranch, and it was there, the first time I saw rock, any rock in the soil, and I called Mr. Tobey's attention to it, and I says, "These are the first rocks I have seen. It looks like elegant soil. You are not

(Testimony of E. C. Kilbourne.)

troubled with rocks here. Up in our Wenatchee land that we had of our own, there are places where we could walk across rocks without touching, walk across a whole acre of ground without touching ground, so many rocks we had to take out. Here I don't see rocks at all, until the middle of the afternoon" After we had driven over the east end of the ranch, we drove on the south side of the ranch, past the combine shed, to which we stepped, and I peeked inside. I don't think we looked about more than two minutes at the combine, which he called attention to. Said was a big fine combine, a 24 foot cut. I didn't learn until afterwards it had been discarded, and hadn't been used for four years. But while we were at—waiting to get dinner, or just after dinner, we looked over the stock. He had most of the mules in the yard adjoining the barn. I looked at the caterpillar engine, which was standing in the yard. It was near the blacksmith shop. Looked through the bunk-house and took particular attention of the pump and well, which is in the corner of the bunk-house, and made all sorts of inquiries of Mr. Tobey, the elder Mr. Tobey. I had considerable difficulty in getting at the real facts. I learned from him a number of things which I put down on a slip of paper, which I have. He said. 4350 acres—

(Two questions omitted)

I made that memorandum that day. 3,000 acres

(Testimony of E. C. Kilbourne.)

can be irrigated. I asked him particularly if he had—the survey had been made which would tell how much of that land could be brought under the proposed ditch from Rock creek. He says 4,000 acres under cultivation; 2,000 in wheat, 1910, average seventeen bushels per acre, produced 15,000 sacks, and I asked him how many bushels in the sack. He said  $21\frac{1}{4}$  bushels; I multiplied that and found 34,000 bushels in round numbers; took a thousand sacks, or 2250 bushels for seed and feed~~d~~ rented last year, 1910, received for own use 7,000 sacks, 15,000 bushels, and got seventy eight cents a bushel, which is \$11,700. Operating expenses last year \$6,000| 1911, have 1400 acres seeded, will seed about 600 more. In 13 years only had one poor crop. Nine horses, twenty three mules, Fifteen teams—these later memorandums were made afterwards. Tobey's statement to me. E. C. K.

I got these facts from Mr. Tobey, that day. Memorandum introduced in evidence, Defendants Exhibit "I", over objection as immaterial.

A. It was a cold, blustering day, the wind was blowing hard from the southwest, and when we started out after lunch, it began to little flurries of snow. By the time we got on the road, on the south side of the ranch, got along on that side toward Olex, the wind was blowing like everything, and the snow was coming down so that we couldn't talk any more, and it was awfully disagreeable, and I came pretty



(Testimony of E. C. Kilbourne.)

near freezing. I wasn't prepared for such weather. And we drove along, I guess, with no conversation whatever until we got down to Olex where Mr. Tobey told me that we could find a man who would give us some information about the irrigation end of it. He didn't know a great deal about that; only had talked with the people who were interested in it.

MR. ERSKINE WOOD: Let me interrupt to ask, is Olex on Rock Creek?

A. Yes, down several hundred feet below the level of this ranch; down in a deep canyon. We drove down in there, arriving a little before five or six o'clock in the evening, just a little before dusk, anyhow, and I want to say I got one of the finest dinners there I ever ate in my life, and I enjoyed it because I hadn't had much *by* crackers for lunch, and there I met Mr. Randall, and he gave me what information he could about this irrigation, he being president of the Rock Creek Association, but said that Mr. Martin, his son-in-law could give me more information, because he was with the engineers when they made the survey for the dam, and run the line for the ditch. We couldn't find Mr. Martin. He wasn't there that day, but Mr. Randall showed us photographs of the dam site. It is a natural site in the canyon being vertical walls, and gave such information as he could about the flow of the creek, which was very indefinite. We went out, and took a look at the creek, and its width and depth. He said some-

(Testimony of E. C. Kilbourne.)

times it ran full and overflowed the banks, and came up to the house, but for several weeks, and sometimes months, in the spring, that creek ran bank full.

Upon my return to Seattle, I looked up the Government reports in my library, and all I could find on the flow of Rock Creek was during the year 1905, which they said, in the Government's report, was a dry season. Mr. Randall said if the waste of the creek were confined in a dam and held, there would be enough to *irrigat* 15,000 acres. And upon learning all the facts I could, I reported to Mr. DeLarm that it looked like a very favorable proposition. The only question was the question of water, and the cost of that dam, and a canal to bring the water, to the land, which is about 16 miles.

Q. Then from Olex you went to the railroad, or did you stop off any at Olex?

A. We stayed all night there, went the next morning to Arlington, and took the train from there to Portland.

Q. What date would that be?

A. Well, I can't fix the date exactly, except this. I have a distinct remembrance of going with Mr. Anderson to the Northwest Trust Company, and trying to get him to pay some \$800. on a note the day before I left, and he said he couldn't do it, but would do it on the next day, and I therefore dictated a letter of instructions to the Northwest Trust Company on the 21st of February, so I am quite sure that I left

(Testimony of E. C. Kilbourne.)

that night for Portland, and on the next day for Olex, and came back the next day after that, which is the 23rd. We arrived at Portland at six o'clock in the evening, and I took the eleven o'clock train for Seattle

Q. Then was it true, or could it have been possible, that you were present at the drawing of the first contract between DeLarm and the Tobey's?

A. I was not there.

Q. Were you in Portland at all?

A. No, sir.

Q. Now, Doctor, up to this time, were you acting exclusively as an adviser and expert and engineer for DeLarm?

A. Yes, sir.

Q. Had you at this time any idea you would ever become interested in this land yourself?

A. No. No more than perhaps build the plant for them.

Q. Yes, but I mean, interested as owner or part owner of the land?

A. No, sir.

Q. Had Mr. DeLarm suggested that to you at this time?

A. No, sir: Never suggested the idea at all.

Q. Now then, after your return to Seattle, you may state what interviews you had with DeLarm and what was their purport and time and date, as nearly as you can give it?

(Testimony of E. C. Kilbourne.)

A. On the sixth of March, Mr. DeLarm came into the office and asked if I would consider taking the Tobey ranch, which I had examined, and going ahead—in payment for our bill, and going ahead with the plant, and finishing it, complete it. The result of the *engotiations*, which lasted over two or three days were briefly as follows: He said the ranch was worth \$120,000. that that is what they contracted to pay for it. This is the first time that I knew what he had contracted to pay for it; that is we would finish the plant, he was willing to allow us a big profit. He says “I am willing to allow you \$20,00. or \$25,000. You take the ranch for \$75,000.—or we discussed the value of it then, the real value. He said, it cost \$120,000 and that is what it is worth. Well, I said, “I don’t consider it any such value”. Well, he reduced it finally to \$100,000. and proposed that we take the plant and call it \$75,000. for our services, plant, etc., and he retain one fourth interest in the ranch. He also said at that time, why, he could go down there and borrow—well, I said, “The Kilbourne & Clarke Company haven’t the capital. They have your plant and half a dozen on their hands unpaid for, and they are out of funds, and out of business”. Well, he said, “Can’t you and C. A. do it—Mr. C. A. Kilbourne?” Well, I said, possibly we can, and we will consider it.” The upshot of it was, that Mr. C. A. Kilbourne and myself, who had personally, with our own personal property secured



(Testimony of E. C. Kilbourne.)

the Puget Sound Bridge and Dredging Company for their—the amount of their indebtedness, putting up our own property; and the Kilbourne & Clarke Company we felt morally bound to stand behind and pay their debts; that we were in it for that amount, and we better go ahead with the contract, provided we could see our way to get sufficient funds to do it. Mr. DeLarm said could raise—we thought we ought to have \$32,500. to do that, in cash; with that we could carry things along all right. He said “Well you can borrow that amount on it all right.” The upshot of it was, that on the 8th of March, we finally agreed to take the ranch over as security for the claim of the Kilbourne Clarke Company, and the expense we would be to in finishing the plant, which we calculated would be \$16,000., but we would not accept it in payment. That we would then endeavor to find out what its real value was, and we would come—if we could come to an agreement upon the price and what it was worth, that we would settle that question. The result was that he agreed then to have it deeded to me, E. C. Kilbourne, to be held as security, and then he told me that the contract called for the delivery of deeds on the 15th of March and I agreed to be there in the office of the Puget Sound Realty Company here in Portland, on the morning of the 15th. I took the late train from Seattle to Portland on the night of the 14th, and arrived here on the morning of the 15th. After getting my break-

(Testimony of E. C. Kilbourne.)

fast I went up to the office of the Puget Sound Realty Company in the Chamber of Commerce Building; found nobody there; called there three or four times before anybody came in; finally the stenographer, a young lady, came in and *opened* the office, and I went in and sat down, read the morning paper, waiting for somebody else. Mr. Humphrey was the first man to come in, and I introduced myself to him, or he did to me, and I learned then that he was the attorney for DeLarm and the Columbia River Orchards Company, and I asked him then if he had examined the abstract and attended to those matters for Mr. DeLarm, and he said that he had, and that he had the abstracts right on his desk, and he opened up his desk and showed them. I asked him if I could look over them. He said, certainly, he said, "but I have examined them already myself" I said, "Have you examined them for Mr. DeLarm? Are you satisfied that the title is all right?" He said, "Yes; there are two pieces of land. One there are some heirs that are pretty badly mixed up, and another they acquired by a quitclaim deed". But, he said, "They have already run ten years or over, and the Tobeyes have had possession all this time without any contest, and while it is not a merchantable title on those two pieces," he says, "I think it is safe, and you will never be disturbed in your possession of them". I said, "If that is the case, all right. I won't employ any—that ought to be satisfactory". I said,

(Testimony of E. C. Kilbourne.)

“Did you know that the land was to be deeded to me,” and he said yes. I said, “Where are the deeds? He said, “They were over in Mr. Brazell’s office.” I asked him if he could tell me where it was, and he did, gave me a description and I went over to an old-fashioned building, and found an old fashioned set of law offices, but Mr. Brazell was not present.

This was the first time I had ever met Mr. Brazell, first time I had ever been in his office. I remember handing him my card and telling him who I was. I had waited there quite a while; I think twenty minutes, before he came in, and I asked him—introduced myself, told him who I was, and what I wanted, and he said he had the deeds. And I asked if I could check them over. I had my form of abstracts, description of lands, lists of lands, and figured up the acreage, and found it to be 4349 and a fraction acres, and I asked him if I could compare deeds with these descriptions, and he said yes, and we sat down, and went over it, and I found an error in one of them, and also found he had made a great many deeds more than necessary, and asked if he couldn’t consolidate them into three or four deeds. He said yes, and sat down there, and made out deeds, consolidated some of these pieces and got them all right, satisfactory to me, all checked up and checked out, and I said “You will be over there, will you, when the Tobey’s come in to sign the deeds”? And he said, “Yes, if they will send for me, I will be all ready”. So I went back to

(Testimony of E. C. Kilbourne.)

the Office of The Puget Sound Realty Company, and found Mr. Hodges and Mr. DeLarm there.

MR. BRYSON: And who?

A. Mr. Hodges and Mr. DeLarm. And during the course of the day the Tobey's came in. Mr. William Tobey, and Mr. Frank Tobey; a little later Mr. E. O. Tobey, and Mrs. Frank Tobey and Mrs. Augusta Tobey, the mother of the Tobey brothers; and Mr. DeLarm and Mr. Hodges took them into Mr. Hodges' room and closed the door. I was in the reception room in which this opened; Mr. Hodges' room opened out. I sat there for awhile, and then finally went into Mr. Humphrey's room, which is another private room, where I could get daylight, and read the daily papers. the *Oregonian*. I was there quite a long while.

And Mr. Brazell came in, went through the reception room into the room where the Tobey's and Mr. DeLarm were closeted, and I am under the impression that he wasn't there very long, and went out, and then Mr.—Mr. Hodges came out. I saw him go out, and when he came back, I was sitting out in the waiting room again, and he went through the room, and I think he undid a bundle of deeds right on the desk, or table, rather in this waiting room, and took the deeds—I don't mean deeds, I mean bonds—and took the bonds into the room where Mr. DeLarm and the Tobey's were, and closed the door. After awhile they opened the door, and invited me in, and intro-



(Testimony of E. C. Kilbourne.)

duced me to Mr. E. O. Tobey, whom I had never met before, and to Mrs. Frank Tobey, and Mrs. Augusta Tobey; and I had most of conversation with the old lady, whom I found a very charming lady.

MR. WOODCOCK: W. L. instead of E. O., you mean.

A. No, I meant E. O.

MR. WOODCOCK: Were three of them there?

A. Yes, sir; and the bonds, I think, were laying in a pile, covered up on the table, or face down. And the deeds were there, and Mr. DeLarm asked me to look over the deeds, and see if the signatures were all right and satisfactory. I looked them all over and saw that they were all signed properly and properly acknowledged by a notary. They Mr. DeLarm said that he—I started to take the deeds; and the bill of sale was also made; they were all made in my name, the deeds and the bill of sale; I *stated* to take them, and Mr. DeLarm, said, “Well, the transaction isn’t quite complete. We will have to take the deeds and the bonds, and put them down in the bank on the ground floor of this building Hartman & Thompson, and as soon as the escrow is complete, why you can have the deeds, and the bonds go to the Tobey’s.

Q. Did they tell you what the terms of the escrow were?

A. Well, he said that they had agreed to furnish the Tobey’s with a loan.

(Testimony of E. C. Kilbourne.)

Q. Of cash?

A. Cash, and they hadn't the money that day, but it was coming down to them though, the next day, from Seattle, and they would be able to take it up in a day or two, and just as soon as that money was to the credit of the Tobeys in the Hartman Thompson Bank, why, the bonds would be theirs, and the deeds would be mine. Well, I said, I acquiesced. I left there, and immediately went to the Balfour Guthrie Company to see about a loan. I talked with Mr. McKenzie. He said that he thought—he knew the ranch pretty well, and he said he thought they could loan \$25,000. Well, I wanted \$32,500. Well, he said, "It is quite possible we might loan \$30,000, but my feeling is now—"he was very cautious and careful—"that we will not loan more than \$25,000." But he says, "We have our Mr. Pattullo right up close to there, and I am in communication with him over the long distance phone every day, and I will hear from him any time now, and I will have him go and see the ranch, and make an examination.

MR. WOODCOCK: Of course, your Honor, we have allowed a whole lot of this hearsay to go in. I don't think it is competent.

COURT: Don't state the details.

Well, upon his report I will let you know exactly what we will loan. The next day I went in two or three times but he hadn't heard from his Mr. Pattullo, and later in the day of the 16th, I think along in

(Testimony of E. C. Kilbourne.)

the afternoon, he had his conversation over the phone with Mr. Pattullo, and obtained a report on the ranch of which he read me, a copy, and he said that the written report would be forwarded in the mails. The conclusion was that he would only loan \$20,000. I tried to get more, but finally accepted it and signed the application for the loan of \$20,000. I signed the application for the loan and left that night for Seattle. Before doing so I instructed Mr. DeLarm or Mr. Hodges, to notify the Hartman Thompson bank, that when that transaction, the escrow was completed, to send the deeds to Balfour Guthrie, Mr. McKenzie.

Court adjourned until 2 P. M.

Friday, May 15, 1913, 2 P. M.

At this time, this case was dismissed as to the defendants Clapp and Lutz, under stipulation.

E. C. KILBOURNE, resumes the stand.

(Questions by Mr. C. E. S. WOOD.)

As I stated before, on the 8th of March, when we agreed to accept the ranch in payment and go ahead and complete the plant. We didn't agree upon any terms for which we would allow for the ranch, but on the 24th of March, we came to an agreement, with Mr. DeLarm, regarding what we would do. It wasn't reduced to writing.

E. C. and C. A. Kilbourne agreed to assume and pay the indebtedness of the Columbia River Orchard Company, to Kilbourne & Clarke Company, amount-

(Testimony of E. C. Kilbourne.)

ing to about \$43,000., agreed to complete the pumping plant which was estimated then to cost \$16,000. We agreed further to put in an additional unit, doubling the capacity of the present plant, or the plant that was previously agreed upon, to be installed at any time upon—I think if I remember correctly, six months' notice. On their part, Mr. DeLarm agreed for the Columbia River Orchard Company, that they would pay the Puget Sound Bridge & Dredging Company, \$7500., for which amount we agreed to secure the release of the lien of the Puget Sound Bridge & Dredging Company then upon the plant, and to pay the difference between that and what was owing them ourselves. And Mr. DeLarm, rather the company, agreed further to assume and pay the indebtedness, owing to the Moran Company, amounting to about \$2250. at that time. And I personally agreed to deed back to the Columbia River Orchard Company two pieces of property in Tacoma, which had been given to me as security on the Kilbourne & Clarke Company contract, one piece of which had been mortgaged by a second mortgage to the Moran Company to secure their claim.

Q. Was this agreement carried out? Did you deed back the Tacoma property?

A. No sir; we didn't do that. We carried out the part of the agreement to complete the plant except install that additional unit, and that little bit of the intake.



(Testimony of E. C. Kilbourne.)

Q. Why didn't you deed back the Tacoma property?

A. Because the Columbia River Orchard Company did not pay off the Moran claim.

(Questions omitted)

We completed the existing unit of the pumping plant in June, 1911, which cost a little under \$17,000!

Q. Where did you get that money?

A. We made a loan, on the ranch we got from the Tobey brothers of \$20,000., from Balfour Guthrie Company, or rather Mr. Burns of that company, and secured finally about \$19,500 of that, and that was the money we used.

Q. You may state when this agreement in which you were to complete these matters, and take the property in payment, the date?

A. The 24th of March, 1911.

Q. And you say it was never put into writing?

A. Only partly. I turned immediately to our stenographer, and dictated that letter to blank, that is in evidence here. The other people put it in.

Q. Now this property was deed by you to Mr. C. A. Kilbourne?

A. Yes, sir. When I went to get my wife to sign the mortgage She was perfectly willing to sign the mortgage, but she objected to signing the notes. That is an understanding we have had for a great many years, that she should sign no notes. I telephoned to Mr. McKenzie, asking if it would be sat-

(Testimony of E. C. Kilbourne.)

isfactory for both of us to sign the mortgage, my wife as well as myself, but for me only to sign the notes. He said no, he must have both on the notes, and Mr. C. A. Kilbourne volunteered to take the property in his name and sign the mortgage and notes both and there were other reasons why the deed should go to him anyway.

A. Well, Mr. C. A. Kilbourne, had advanced the Kilbourne & Clarke Company, to carry on during these trying times, about \$72,000|. and this ranch was turned over, and deeded to his name, as part payment on that indebtedness.

Q. Now, I wish you would tell the reason why the second unit was not installed and completed as per agreement just spoken of.

A. In the fall of 1911, September, Mr. DeLarm, came to me and said that he was very anxious to get some money to pay for the right of way and ditch, and the land there, to the Northern *Pacific*; and also the Puget Sound Bridge & Dredging Company had been putting off from month to month the foreclosure of their lien, and he was anxious to do something to get that lien released, as he was under contract to do it, but he didn't have any means to do it, ready cash. And they wouldn't accept anything but cash. He therefore proposed that we put a mortgage, a second mortgage on the ranch, of \$17,500., of which \$7500 would go to the Puget Sound Bridge & Dredging Company, and clear off

(Testimony of E. C. Kilbourne.)

the lien, and \$10,000 to go to him; and as a consideration for that \$10,000. that would go to him, he agreed to release us from the installation of that future unit, and the completion of the intake of the little—which we figured out would cost about a thousand dollars; possibly fifteen hundred.

Q. Now, state how this was carried out, this supplemental release agreement.

A. Well, he said in conversation that he could get the money; he had a party that he thought —

Q. If you would give the mortgage?

A. If we would give the mortgage. Well, our reason for giving the mortgage was that we owed the Puget Sound Bridge & Dredging Company, that is, owed them and we had to pay at that time some \$20,000. We had paid it down to \$20,000. then, or nineteen thousand something, and they were threatening suit, and taking judgment against the Kilbourne & Clarke Company; and so we consented to giving the mortgage, and he brought over a Mr. J. Alexander Wakefield to our office. And without going into the details of that conversation, what Mr. Wakefield said, the result was that Mr. C. A. Kilbourne gave a mortgage for \$17,000. \$17,500., payable to Mr. Wakefield.

Q. And this mortgage is what is known here in this record as the Clapp mortgage?

A. Yes.

Q. In what way?

(Testimony of E. C. Kilbourne.)

A. That mortgage was assigned from Wakefield to Clapp.

Q. I just want you to identify it. I want you to state the transaction now.

A. Mr. Wakefield, said that it was Senator Clapp's policy not to pay any mortgage until it had been filed of record, and he had notice from his agent that it was filed. That is exactly the same method and statement that Mr. McKenzie made when we gave him the mortgage and notes to Mr. Burns, or what we call the Balfour Guthrie mortgage. Mr. McKenzie said he wouldn't pay any money over until the mortgage was on record at Condon, and he had gotten word back that it was recorded. Mr. Kilbourne gave the mortgage and notes to Mr. Wakefield, and we understood—I don't know from my own knowledge only what was told me—that he turned it over to Senator Clapp or Mr. Lutz. Mr. Lutz took it to Condon and had it recorded, and sent word back and then we tried to get the money from Mr. Wakefield, and I will say that I never saw a better staller in my life.

Q. Never saw what?

A. A better staller in my life than Mr. Wakefield. We never could get anything; never got a cent from him. Of course we got the release from Mr. DeLarm and the Columbia River Orchards for the \$10,000., which were credited to the Columbia River Orchard Company, but the one very chief reasons



(Testimony of E. C. Kilbourne.)

for giving the mortgage, to secure the \$7500. to give to the Puget Sound Bridge & Dredging Company, was to get longer time, never materialized.

Q. All you ever got out of that note and mortgage was a \$10,000. credit, by which you were released from completing the second unit—

A. Yes, sir.

Q. (Continuing) And the intake. I show you Plaintiff's Exhibit 58, and ask you if that is the letter you refer to, which is a settlement between you and the Orchards Company and DeLarm, to which you have just referred?

A. Yes, that covers part of the settlement.

Q. Which part?

A. The part which we were to do. Complete the plant, and that the Kilbourne & Clarke Company had been paid. I will state right here that that is not exactly as I dictated it the first time to our stenographer. I addressed it to the Columbia River Orchards Company, but at Mr. DeLarm's request, I changed it to the Washington Orchard Irrigation and Fruit Company. That is the first time that I knew that company was in existence.

Q. Now, before we leave this branch of the subject, I will ask you whether Mr. DeLarm, in all your negotiations, ever tendered you bonds in payment, or asked you to take them?

A. If he did, it was never considered. I don't remember that he ever did. He may possibly, but—

(Testimony of E. C. Kilbourne.)

Q. But you don't remember?

A. No.

Q. Why wouldn't you consider it?

A. Well, it is a fixed policy of our company not to do it. and the compabt was short of money and couldn't do it; that is the Kilbourne Clarke Company. They have to have money to carry on transactions, and Mr. Kilbourne was advancing money all the time to carry on these, and to continue other irrigating

Q. Did you know anything about the value of the bonds, or make any investigation?

A. I made no investigation except the investigation we made right on the start, which could, perhaps, be a basis of their bonds.

Q. That is the property, the physical property?

A. Yes, and the water mortgage.

Q. But when you and they both got hard up, and you were pressing them for money, did you make any investigation of the value of the bonds?

A. No, never considered taking bonds.

Q. What was the reason that you preferred to take the property?

A. Because we could raise—we thought when we first took it, we thought we could raise \$30,000; we could raise money, immediate cash. I have an original letter from Mr. Plummer, to me and Mr. Cooper's letter, to which he didn't testify. (handing letters.)

Q. The letter I am after is asking if it wouldn't

(Testimony of E. C. Kilbourne.)

be possible to get the title to the pumping site, and also signed by Kilbourne & Clarke Company, engineers. Do you remember writing a letter which has been read into the record here, to the Northern Pacific Land Agent, to the effect—asking if they couldn't get the title to the pumping site.

A. Yes, sir.

Q. This is the one we just showed you; we haven't got it; the one we are talking about Mr. Plummer took home. Do you remember writing such a letter?

A. Yes.

Q. In what capacity did you write that letter?

A. As engineers for the Columbia River Orchards Company.

Q. Who were about to construct the pumping plant?

A. Yes, were constructing.

Q. What was your interest in the matter?

A. It is my business to do just such matters connected with engineering and the construction of the plant, and one of the principal reasons why I was interested in getting the property on which the plant was situated was so that we would have our—the plant that we were constructing on the properties that was in the name of the Columbia River Orchards Company, so if we should ever have to put a lien on it it would be a good lien. One of the first jobs we did was to make a survey of the land and find out

(Testimony of E. C. Kilbourne.)

where it was situated and furnish that very information to the Columbia River Orchards Company. There is a little matter there that might be of interest.

Q. I show you a letter headed Northern Pacific Railway Company, dated July 13, 1910, and addressed to E. C. Kilbourne, Esq., signed Thomas Cooper, Land Commissioner, and I will ask you whether that is a reply to the letter we have been discussing?

A. It was a reply that was finally—it was a result of that letter; the letter that you were discussing was written to Mr. Plummer. Mr. Plummer said he couldn't settle the matter until Mr. Cooper came out. Mr. Cooper *Cooper* came out and I saw him personally and that is his letter.

Q. And prior to that you had received a reply from Mr. Plummer which I now hand to you dated June 9, 1910, had you?

A. Yes, sir.

Q. So that these two letters constitute the reply to your letter, the first from Mr. Plummer, and the second from Mr. Cooper.

A. Yes, sir.

Letter of June 9th, 1910, from Mr. Plummer, identified introduced Defendants' Exhibit "J".

One dated July 13, 1910, from Mr. Cooper, Defendants' Exhibit "K".

The conversation had with Mr. Plummer at the



(Testimony of E. C. Kilbourne.)

time when I wrote the letter reminding him—previous to writing him the letter to remind him to talk with Mr. Cooper when he came out, was practically to this effect: I wanted to know if we could get for the Columbia River Orchard Company, for which we were acting engineers, a deed to the canal right of way and to the pumping site, and he said that they had it arranged with the Columbia River Orchard Company—he went and pulled down his file and—agreed to give them that same thing, and then I took it upon myself, without any instructions from Mr. DeLarm, at this phase of the matter, to ask him how about securing the lands below the ditch. I did it with a great deal of hesitation because of previous interviews on lands over on Moses Lake, which I applied for for another party. He said all these lands had been withdrawn from sale, and he explained that the conditions were changing and the prices were fixed on the basis of agricultural lands, and now were changing, and gave me to understand they were raising their price, but the *the* thing hadn't been settled yet.

Q. What was your interest in the right of way for the canal?

A. I was acting as engineer for the Columbia River Orchards Company.

Q. What was your interest in the agricultural land?

A. Well, I had no interest, but you see - - -

(Testimony of E. C. Kilbourne.)

I had another conversation with Mr. Plummer in 1911 after we had entered into this contract to complete the plant by E. C. and C. A. Kilbourne. It was in April, and his letter to me was dated April 29th, in which he stated that for \$50. an acre they would convey the lands to the Columbia River Orchards Company; well, it didn't apply directly to me it applied directly to the Columbia River Orchards Company but said "Replying to inquiry of Mr. E. C. Kilbourne regarding sale of pump house site and right of way for Wahluke Ditch, I beg to say that we will renew our offer to sell a right of way, 50 feet wide for canal, and pump house site of three acres at the rate of \$50.00 per acre upon the condition that the canal be constructed and pumping plant installed ready to furnish water within one year from date of sale. Sale will be made for cash, but deed will contain clause providing for reversion of property to the grantor in case its use for irrigation purposes is abandoned. Before sale is made, we should have a map showing the correct location of the ditch and pumping station, also the area of the rights of way across the subdivision owned by the company. This proposition will be held open for your acceptance for sixty days from this date. Yours truly, G. H. Plummer, Western Land Agent."

A. That letter is all in evidence. What I want to know is how did you get a copy of that letter addressed to the Orchards Company?

(Testimony of E. C. Kilbourne.)

A. They brought it to me.

Q. They furnished it?

A. Yes.

MR. BRYSON: What is the date of that letter, please?

April 29, 1911.

Q. Now, were those the only conversations you had with Mr. Plummer, relating to this matter?

A. I had just a short conversation with Mr. Plummer, when he introduced me to Mr. Cooper, the land agent, at Seattle, in July 1910. These were all the conversations in the matter?

Q. Do you remember a chat with Mr. Edwards in the bank, to the effect that you were glad that a local company was taking hold of this trust?

A. Yes, sir. It was recalled by his evidence. It had slipped my memory, that is, it hadn't occurred to me until he spoke of it the other day.

Q. You remember it now?

A. Yes, sir.

Q. About what time would say it was?

A. Pretty early in the inception of the work.

Q. But after you had taken the contract?

A. Yes, after we had taken the contract.

Q. And what is your recollection of what the conversation was?

A. They have a bank there called the Seattle Title & Trust Company—Seattle Trust & Title Company—I have forgotten which comes first, and the back

(Testimony of E. C. Kilbourne.)

end of the bank is a large room that widens out into an "L" shaped room, and back there they have their abstract department. I had been back in the abstract department regarding an abstract I was having made by them, and going out I saw Mr. Edwards, sitting near the entrance at the back there, in the manager's—I think on the desk it said Entrance, Manager. I had known Mr. Edwards; he had just gone in there. I had known him as a promoter all that time, in a private capacity, and I congratulated him upon his election to this office, and I don't know how the conversation happened to drift on—I think I asked him what business the bank was going to pursue, what line of business, because they were a trust company and an abstract company and a bank, all three, and I was personally acquainted with Mr. Wiley who was the financial backer, and Mr. F. W. Baker, of the Seattle Hardware Company, another financial backer, and Mr. Black, still another one, all friends of mine. I said "You have got a pretty strong institution here, it looks to me" and I said "What is going to be the nature of your business?" and then he told me that they proposed to take up trusts where they were good projects, and to handle bonds and underwrite bonds. I congratulated him upon the fact that some Seattle institution was going to help out in the building up of the state by *bloating* bonds and securing the money



(Testimony of E. C. Kilbourne.)

to develop the state. I was very much *interest* in irrigation myself.

Q. It was a mere casual conversation?

A. Yes, sir.

Q. When did you first learn how much DeLarm had paid in bonds for the Tobey Ranch, and state what your conversations with him were in regard to the purchase of the ranch, when you thought he was going to be the owner, before you had agreed to take it over?

A. I think that either going over on the train or in some of his conversation that he had said he was going to pay \$25.00 an acre, or \$120,000, or had—that is what he had paid for it or was going to pay for it. I got it in my head somewhere that that was the amount, but I didn't pay any attention to that, the price or the consideration at all, because it wasn't what I was going for. I was an engineer and my thoughts didn't run in that direction, and it had nothing to do with the cost, the job that I was on.

Q. Then when did you learn that he had paid \$140,000?

A. On the 16th a day or two after, I think it was the next day after the transaction had occurred in the office on the 15th when the deeds were passed. I learned of it in this way; I asked him for a copy of that contract of March 4th; I thought it was March 1st, I got it in my head, and it was for the

(Testimony of E. C. Kilbourne.)

reason that he said that under the terms here of that contract, he had assumed all the bills on the ranch from the first of March, as he put it the cleavage date. Well, I said "I want a copy of that contract to know what has to be done in regard to the ranch and the Tobey's, and also to get a further description of the property, to see if it corresponded with the deed for the personal property or bill of sale."

And he didn't—he said, "Well, I haven't got anything but the original and I will have a copy made and furnish you, which he did, and I think he gave it to me the next day, the 16th. Then when he gave it to me, I said you paid \$140,000." I said "I thought it was \$120,00." and he didn't seem to answer, and I says "Why, Mr. DeLarm, that is altogether too much." I had found out then from Balfour Guthrie that they considered it worth—what their report was on it for a loan and I said "Why Mr. DeLarm, that is too much to pay; it ain't worth it." Well, he said, "It may not be; I don't think it is, but" he says "it does this, it puts the water in the ditch, and pays for that plant, and it will make our project a success, and that is what I am after; I am willing to make any sacrifice.

Q. Do you remember any conversation, I think it was on the street; it may have been in your office, with Mr. Heaton, the attorney that testified here?

A. That was in our office.

Q. And what date—what time was that?

(Testimony of E. C. Kilbourne.)

A. Well, I could tell exactly if I could look on the cash book of Kilbourne, Clarke & Company, when I paid him the ten dollars, but I presume his testimony is correct, because I notice by my expense account that I got back in Seattle on the—I think it was the 6th of April, and he testified it was about the 6th.

He came into the office and said, or asked, he said “You are putting in the power plant for the Columbia River Orchards Company?” I said yes. He said, “Have you been paid for it?” I said yes. And I said, “Not only for that, but, I says, “We have been paid for an additional unit that is to go in some time later.” And he said, “Well, do you know that company—there is a receiver asked for?” And I said no, “That is news to me.” He said, “That is a fact.” Well, I says, “On what ground.” “Well, because,” he says, “they haven’t paid the interest on their bonds.” I said “That is all news to me.” I wondered at it. I thought the company now was in good shape, and would go right ahead, and be all right. and a success, and then he said, “I notice by the records in the case here that you are a creditor of the concern, that recently went into the hands of a receiver and assignee, and that they owe you quite a little bill here.” Well, he said, “I have gotten the accounts, in handling the cases for about ten or twelve of the different creditors, and I would like to get yours to consolidate with the others. I have

(Testimony of E. C. Kilbourne.)

means by which I think I can collect your bill pretty nearly in full, if not quite in full." I said, "Do you feel sure that you can collect it?" He said, "Yes." Well, we had a regular attorney, a Mr. Corey, who was attending to all such accounts, but I said, "If you feel sure that you can collect it, I just as lieve let you do it." He said, "Well, I shall want \$10, as a retainer to pay expenses, and from that I will pay the expenses we will incur, your share, and I think I can collect the money for you." So I turned to the bookkeeper, and asked him to make a check for the ten dollars and give it to him.

Q. Now, you said—

A. And I immediately, after he left the office, I immediately called up Mr. DeLarm, and asked him to explain and tell why and what there was to it. Mr. DeLarm said he would come down and see me, which he did immediately, and I said, "What is there to this? Have they asked for a receiver?" He said yes. I said "What for?" He said, "Nothing but a blackmailing case." He says, "He has a few hundred dollars of bonds, and that the interest on these bonds, while it is past due, it has been tendered him and he has refused to accept the interest. He is holding out for the whole sum." He says, "He just buys up these bonds, buys them up in order to bring a case in court, in order to bleed us; that is all."

Q. Now, you said that you thought that now the enterprise would be a success. What did you mean



(Testimony of E. C. Kilbourne.)

by "now?" What day or transaction do you refer to as making a success?

A. The contract with E. C. and C. A. Kilbourne to complete the plant, so that they could put the water in the ditch. Everything hinged in putting water in the ditch.

Q. Did you ever in any way have anything to do with the affairs of DeLarm's companies, or know anything about them?

A. No, sir.

Q. As far as you did know anything about them, what was your opinion as to the feasibility of the concern after you had given them the pumping plant complete, to put the water in the ditch?

A. It was perfectly feasible, was all the time; had great confidence in the proposition; have today.

I paid no attention to the bond issue whatever, except on the early start, the very first proposition, the question of bonds came up thru the conversation in which he (referring to DeLarm) said that the bonds of the company would be \$300,000. were practically sold in the East. That is when Mr. Kilbourne and myself were investigating their resources.

(Several questions omitted.)

I was in Mr. Brazell's office only once and that was on the morning of the 15th. Mr. Tobey, wasn't with me. It is my direct memory that I was in a hurry to get back, I was very busy at that time, and hated to give up the time I did to the trip, and I

(Testimony of E. C. Kilbourne.)

rushed right back, and I remember I went that same night. I had no direct interest or concern what contracts Mr. DeLarm made with the Tobeys. There was no reason why I should wait over in Portland. I thought his contract was all ready made. He told me he had a contract for the land before I left Seattle.

This DeLarm project was not the only one in which we were engaged. I had a half dozen under way at the same time for other people.

Why, we had under way during that time, and just before, and through and during that time, one for the Cohasset Irrigation Company, just above the Milwaukie Road on the Columbia River; we had made a preliminary survey and estimate on the power plant at Priest Rapids, for the Mattewa Power & Irrigation Company, and that was up, under consideration, at that time; made a survey and estimate for Joe Hoskins over near Moses Lake, and we had under construction one for the Aronda Water & Land Company, another for the Entiat Irrigation Association; that is near the Columbia River above Wenatchee, and just about the same time one for George D. Brown on the Chelan Falls, on the Columbia River, one for the Long View Orchard Company, on the Columbia just above Wenatchee, and several others. We were constructing furnishing material; some of them we were only consulting engineers on, but we furnished machinery for all of them, too.

(Testimony of E. C. Kilbourne.)

Q. They were all taking money too?

A. I should say so.

Q. Now, when you started in on this contract you said you made some investigations, and that you found—and then at that time, as I think, examined some water mortgages or water contracts, or something like that.

A. When Mr. DeLarm, submitted these water mortgages as assets, I enquired first of his attorney as to the validity of them, whether a man has a right to mortgage property that he didn't have a deed for, that is still in the government for a lot of these were just simply desert land filings, and he said that they were all right, that he had written to the Secretary of the Interior, and expected a letter any time. I went over to Ballinger, Battle & Ronald, and asked them their opinion, and they said that a man having a desert filing had a perfect right to mortgage it and the mortgage was good.

Q. You have said you didn't turn back the Tacoma property, because they never fulfilled their part of the agreement. Did you have any securities which you did surrender when you got the Tobey ranch?

A. We had some water mortgages which we surrendered them, some. Some were given to William T. DeGraaf, and signed for by him for the Columbia River Orchard Company, and some I think, were given to Mr. DeLarm, personally.

Q. Did the financial success and validity of this

(Testimony of E. C. Kilbourne.)

project, from your examination and knowledge of it depend on the possession of the Northern Pacific land?

A. No, sir. I felt confident that they could get it at any time they got their ditch completed, and showed good faith. The ownership of that land would not at any time have been necessary to the success of the undertaking. I don't think it depended on securing that land. It would have been a feasible project; we could have sold water to everyone below the ditch and everyone below a proposed ditch above; that many outside of the Northern Pacific seven or eight thousand acres. They were willing to pay for water \$100. an acre, which was about the going price.

Witness, referring to the 15th of March, when he was in Mr. Brazell's office, said I know I was in Seattle, on the night of the 14th, from a letter I ordered my stenographer after she had left to write for me. and she wrote it on the 15th and signed it for me. I am sure from my notation on that letter I came down here only on the 15th.

Q. Why were the Puget Sound Bridge & Dredging Company, permitted to foreclose their lien?

A. We had agreed with Mr. DeLarm, that we would secure the release of that lien if he would pay in \$7500., but he never paid the \$7500.

Q. That should have come from the Clapp mortgage?

A. Yes, sir. Mr. DeLarm had a written from our



(Testimony of E. C. Kilbourne.)

company to that effect. It has already lapsed, but we would be very glad if they would pay the \$7500. with the thousand dollars attorneys fees that accrued afterwards and expenses and interest from that date to this. We have so expressed to Mr. Anderson, who is reorganizing the concern.

Cross Examination.

(Questions by Mr. WILLIAMS.)

Mr. Kilbourne, you testified that in the agreement with Mr. DeLarm about the 24th of March, 1911, you settled on the consideration for the Tobey land as the \$43,000. that the Columbia Orchard Company owed you. Is that correct?

A. No, you have that a little bit twisted. That was only a part.

Q. I understand; but that was a part of the consideration, that \$43,000?

A. No. This was E. C. Kilbourne and C. A. Kilbourne. The agreement on the 24th of March, and we agreed to pay off the Kilbourne & Clarke claim of \$43,000.

Q. Now, then, in addition to that, you say you agreed to do additional work?

A. Yes, sir.

Q. For \$16,000. estimated value?

A. Yes, sir, and still more.

Q. Then the second unit?

A. Yes, sir.

Q. At how much?

(Testimony of E. C. Kilbourne.)

A. \$10,000.

Q. Now, you say that DeLarm was to pay \$7500. on the Bridge & Dredging Company account?

A. Yes, sir.

Q. And the Moran account how much?

A. \$2250. We, however, had security which was to be deeded back to him.

Q. Now, what did you figure as the total amount that you paid DeLarm for the ranch?

A. We don't figure it in any particular amount.

Q. Well, you have figured that up, haven't you?

A. Oh I think so, but I haven't figured any particular amount. It was those things. Was money across, back and forth.

Q. That would be \$43,000. and \$16,000. and \$10,000?

A. How much those were added to.

Q. \$69,000?

A. Take off \$7500.00.

Q. Take off \$7500.00?

A. No, I don't know as you need take that off; just leave it on.

Q. What?

A. No, that don't come off really.

Q. Does it go on or off now? I want to get a fair understanding of that?

A. I don't care what you do with it.

Q. How is that?

(Testimony of E. C. Kilbourne.)

A. It really wouldn't effect us; it wouldn't effect the question at all.

Q. Now, is that \$69,000 with \$7500 in addition, of \$69,000 less that?

A. \$69,000 is the gross amount.

Q. That is the gross amount that you agreed with Mr. DeLarm on?

A. We didn't do it in figures; we said we would take the ranch and do so and so, and he would do so and so, and we didn't reduce it to figures at all; the consideration wasn't in dollars; he wasn't paying us in dollars; he was paying us in a ranch, and you could call it \$140,000 as Mr. Tobey did once, or \$100,000 as he did once, or \$75,000 or \$80,000 as he did once.

COURT: Counsel wants to know how much the ranch cost you; how much you allowed DeLarm for the ranch.

A. Practically those figures, Judge.

COURT: \$69,000.

A. Yes, sir.

Q. Now, at that time you say you estimated the amount of work to be done on the pumping plant to complete it at \$16,000?

A. Yes, sir.

(Colloquy between Court and Counsel.)

Q. You estimated it at that time at \$16,000. and you figured this \$43,000 and \$10,000 for the addition-

(Testimony of E. C. Kilbourne.)

al unit; that made \$69,000. Now, was this \$7500 to come out of that or in addition to it?

A. Mr. DeLarm was to pay that, and I was to turn back this Tacoma security which he estimated was worth about \$15,000; that is another element of value there.

Q. How is that?

A. I say the Tacoma property makes another element in the situation; there are two pieces of property there that he considered worth \$15,000.

COURT: Those are the ones put as security for the dredging?

A. No, no, not put up as security; still in my name now.

COURT: I say put up to you as security?

A. Yes.

Q. These pieces of property were put up as security for this \$43,000 under your contract with them?

A. Yes.

Q. And what did you say you did with that?

A. Still in my name now.

Q. Now one of these is the Reinmouth property, is it?

A. Yes.

Q. And the other one?

A. Called the Billings property.

Q. Now, for what reason are you holding the Billings property at this time?

A. Security for this Moran claim and the \$7500



(Testimony of E. C. Kilbourne.)

that they haven't the Columbia River Orchard Company haven't paid the Dredging Company.

Q. Now, then in the adjustment, Dr. Kilbourne, I believe you said that this \$17,500 mortgage was given for the purpose of, paying the \$10,000 for the release of the additional unit, and to pay the Puget Sound Bridge and Dredging Company for the release of their lien?

A. So that we might secure that money to do those two things, yes.

Q. Now, if DeLarm agreed to pay that money to the Puget Sound Bridge & Dredging Company to have them release the lien, why were you paying it?

A. Because Mr. DeLarm didn't have the cash and the Puget Sound Bridge & Dredging Company were holding the Kilbourne Clark Co.

Q. Now why, if at the same time DeLarm owed you \$7500 to go to the Puget Sound Bridge & Dredging Company—why did you pay him \$10,000?

A. To be released from installing that other pumping plant; we had gone into the farming business and out of the contracting business, and so as to have no installation contracts on hand.

Q. I see, but I don't quite catch your idea there; wouldn't that make DeLarm indebted to you in the further sum of \$7500 if you paid his indebtedness in that amount?

A. Not any more so than he was indebted. I don't see that it would make him in debt any more;

(Testimony of E. C. Kilbourne.)

he would be indebted to us instead of the Puget Sound Bridge & Dredging Company; that is all.

Q. When you gave that Mortgage, who did you deliver it to? Who did C. A. Kilbourne deliver it to?

A. Mr. Wakefield.

Q. Were you present at that time?

A. Yes.

Q. And you were interested in the proceeds of that mortgage personally?

A. Certainly to the extent that we were both interested in the whole matter, Mr. C. A. Kilbourne and myself.

Q. How did it come, being interested in the mortgage and the proceeds of it to that extent, that you didn't pay any more attention to what became of the proceeds than you seem to have done?

A. Perhaps you don't know how much; perhaps it don't seem as much as it really was; hasn't been any seeming around here. If you had been on the ground, you would think differently.

Q. Well, I am asking you why you didn't pay more attention to the place where the proceeds went to than you did. It appears in the evidence here that the \$7500 never reached the Puget Sound Bridge & Dredging Company at all.

A. Well, to clear up from your mind any seeming appearances, I will state that we haunted that man day and night and we employed an attorney to

(Testimony of E. C. Kilbourne.)

collect the money and to prosecute him in any way and every way that they saw fit, and Mr. McClure of McClure & McClure has done everything we could, and if you can collect money out of J. Alexander Wakefield, I will give you all you can get.

Q. Well, you seem to have had confidence enough in him to entrust him with that mortgage.

A. Certainly I had confidence in him; didn't know anything to the contrary; the greatest surprise of my life when it turned out the way it did.

Q. How did it come when you didn't know that the mortgage had been discounted five thousand dollars until this case was commenced?

A. I didn't say so; I knew that in the bankruptcy proceedings in Seattle.

Q. Was that the first time you knew it?

A. No, I think I discovered it before that. No I think I discovered it soon after—we were trying to collect the money from Wakefield.

Witness was handed a statement dated September 22, 1910, showing indebtedness of the Columbia River Orchard Company to the Kilbourne Clarke Company, engineers, identified by witness introduced Plaintiffs' Exhibit 135.

Q. Now, the statement, Dr. Kilbourne, shows on July 15th a credit for cash by Hawkins of \$1334.00; just explain.

A. Mr. DeLarm brought to us a mortgage which was turned in as payment on account, and Mr. Haw-

(Testimony of E. C. Kilbourne.)

kins was the man who paid off the mortgage and gave us a check for it. The next item, by cash, July 16th, by Sam Archer \$825.00, is the same way only Mr. Archer paid it.

Q. That was another mortgage?

A. Yes.

Q. Now, were these mortgages made to Mr. DeLarm or to Mr. Biehl, or to DeLarm and Biehl, or how *ere* they made?

A. No; no, I think they were mortgages that they had acquired. A client of Mr. Hawkins, and a client of his paid the mortgage although he gave us the check.

Q. From whom did you get the mortgages?

A. From Mr. DeLarm.

Q. They were some he had traded for?

A. Yes, sir.

Q. Now, in this account there are a number of items of invoices of the Puget Sound Bridge & Dredging Company and work done by them. Are those accounts for which the Puget Sound Bridge & Dredging Company's account was made up?

A. Yes.

Q. Then the \$24,000 or such matter that was due to the Puget Sound Bridge & Dredging Company is wholly included in this \$43,000?

A. I think so, yes; they didn't work any after that time.



(Testimony of E. C. Kilbourne.)

Q. Now, was there two or three—there are three items, I believe in this, of the Moran Company?

A. Yes.

Q. Does that include the Moran account about which you testified that DeLarm was to pay?

A. Yes; I don't know that it includes it all. It may; I presume it does.

Q. Now, what payments were made to the Puget Sound Bridge & Dredging Company on their account?

A. By whom?

Q. By you?

A. We paid them about \$5,000.

Q. Where did you obtain the money from to pay them?

A. C. A. Kilbourne, advanced \$2500, at one time, and I think \$2500. of it was from this ranch, the mortgage on that ranch.

Q. You didn't pay them any money then, that you got from DeLarm and Biehl?

A. No.

Q. Were there any other business transactions between you and the Puget Sound Bridge & Dredging Company than this one?

MR. WOOD: Just a moment, I am not clear myself about the purport of this cross examination, but I want to object to any questions going into amount of consideration, the bill doesn't allege anything of the kind. It alleges no consideration passed direct-

(Testimony of E. C. Kilbourne.)

ly from these people to the Tobey boys. It isn't pretended it did. We took it as if it had passed thru Mr. DeLarm's hands. He furnished the consideration.

COURT: I suppose the purpose of this cross examination is to show just what these people did pay for the land as it may bear upon their knowledge of this alleged fraud. I am not clear about this testimony myself.

Q. You said that at the time of this adjustment, DeLarm, owed the Kilbourne & Clarke Company \$43,000. and at the same time they owed the Dredging Company a larger amount.

A. No, we owed the Dredging Company, and they owed the Dredging Company, only because they owed us \$43,000.

COURT: The \$43,000. that DeLarm owed the Kilbourne Clarke Company, including the Dredging Company?

A. Yes, sir. We were personally liable, the Kilbourne Clarke Company was to all these concerns.

MR. WOOD: In order that it may be clear, the Puget Sound Bridge & Dredging Company, was a sub-contractor under them. The Moran account was in the same condition, sub-contractors, and they owed the debt.

Q. And that account of the Puget Sound Bridge & Dredging Company is the same one for which

(Testimony of E. C. Kilbourne.)

COURT: That was after the supplemental agreement of May 10th?

A. Yes, sir.

Q. Did you send the Columbia River Orchards Company any statements after that one of the 22nd of September?

A. I think not.

Q. That was the last statement you sent them?

A. I believe so. There were some items of expense after that time, but they were not very large.

Letter of February 8th, 1910, signed by Mr. Kilbourne identified, introduced Plaintiffs' Exhibit 137.

Receipt for Reinmouth property dated September 20 1910, identified, introduced in evidence, as plaintiffs exhibit 138.

Q. How many mortgages was it that you obtained from Mr. DeLarm?

A. Three I think, I ain't sure.

Q. Two of them were mentioned in this statement?

A. Yes.

Q. And what was the other one?

A. One later that Mr. Anderson had something to do with. We got out of the latter mortgage, I think, \$800., which was credited to the Columbia River Orchard Company.

Q. Then that should still further reduce the amount of \$43,000. should it not?

A. Yes.

(Testimony of E. C. Kilbourne.)

That amount doesn't appear on the statement; it was after the \$43,000. item. At one time I had \$152,000. face value of these water mortgages, at another time \$88,000. I don't think we surrendered any at the time we took the Reinmouth property.

Witness was handed receipt for two water mortgages, signed by Mr. Biehl, identified, marked "Plaintiffs' Exhibit 139.

Q. How did you come to surrender these two mortgages of Frank Clymer and William E. Stickels at that time?

A. We had earned considerable money previous to this time and had this property turned over to us. Previous to the date of that September, statement, we had been paid \$4,000, thru these mortgages and other means.

Q. Then this statement of September 22, 1910, why was not the total credited upon it?

A. Because it had been credited before. They paid us the total of \$4,000. Just when it was credited I don't know because I don't keep the books, and didn't keep the books. Not all of it is shown there (referring to statement) because some of it was made afterwards.

Q. Now, why at that time did you surrender these two mortgages?

A. We had plenty more and they asked for them. After considerable cross questioning as to where the other payments came from besides those shown



(Testimony of E. C. Kilbourne.)

on statement and what they were, witness said:

I am very clear in my mind that there was \$4,000. paid that was the total amount ever received from them.

Witness handed letter dated June 8th, 1911, identified.

Q. Now in the letter that you signed, dated June 8, 1911, you say there is a copy of a letter enclosed from Mr. C. A. Kilbourne, that Mr. C. A. Kilbourne wrote. Examine the copy and state whether or not that is the one that you enclosed in that letter.

A. I don't see that it says so.

Q. "Mr. C. A. Kilbourne wrote such a letter in your office, dictating it to your stenographer, and she sent a copy of the letter to me. I am somewhat doubtful of the wisdom of my writing on top of the letter from Mr. Kilbourne, copy of which we enclose." Now examine the copy and see if that is the one you enclosed.

A. I don't remember, too long ago. I presume likely.

Q. Well, examine and see.

A. I didn't write the letter.

Q. Well, you enclosed the copy in the letter you wrote.

A. Well, I couldn't identify the copy.

Q. Just examine the copy carefully and see.

A. I couldn't identify it.

Q. Well, did you read the copy when you sent it?

(Testimony of E. C. Kilbourne.)

A. I presume I did, I don't know.

Q. Just read that over, and state whether or not that is a copy of a letter that Mr. C. A. Kilbourne wrote?

A. Well, I don't know. If it had been one I wrote. I could tell from the language, even if my signature was not there. But for another man, I couldn't. I paid little or no attention to it.

Q. Do you deny the copy there is the copy of one that he wrote?

A. No, I don't deny that the moon was made of green cheese either.

MR. WILLIAMS: We offer in evidence the first two, and ask that the third one be marked for identification.

E. C. Kilbourne letter 6|8|11 marked "Plaintiffs' Exhibit 140."

Statement enclosed marked "Plaintiffs' Exhibit 141."

Letter enclosed marked "Plaintiffs' Exhibit 142 for iden."

Assignment of a lot of water mortgages identified by witness introduced in evidence as "Plaintiffs' Exhibit 143." Dated April 30, 1910.

About that time, the time of the Tobey deal I think, we surrendered some of the water mortgages. We surrendered some that we had previous to that date. We at one time had \$152,000. Then for awhile we had \$88,000. At about the time or soon after the To-

(Testimony of E. C. Kilbourne.)

bey deal was consummated we surrendered all we had.

Q. This exhibit 141, bears no date, can you tell when you assigned these mortgages back to the Columbia River Orchard Company?

A. No, sometime not a great while after the 27th of March.

Q. You are satisfied that you transferred these back to the Columbia River Orchard Company, after the 27th of March.

A. I don't know it might have been earlier than that even.

Q. Now isn't it a fact that they were all surrendered prior to the first day of February, 1911, that is those that are mentioned in this exhibit 141?

A. Yes some of them I think we did surrender before. We had 152 at one time and then we surrendered a part, and then we surrendered a part so we only, had \$88,000.

Q. This amounts to just 88,000, are these the 88,000 that you had left?

A. I don't know, I presume so.

Q. They were not transferred back on account of the Tobey deal?

A. Not necessarily, no. We were protected by a lien then, and some of those mortgages had run out at that time. Some of those mortgages expired in May 1910, some of the first mortgages got. I am not sure whether it was May 1910 or May 1911. It didn't

(Testimony of E. C. Kilbourne.)

worry me about their running out, I knew we could always renew them. The parties would jump at the chance to renew them, if they could see the water in the ditches. They were more anxious to give the mortgages than anybody was to take them.

The Reinmouth property was located at Taccma, and also another piece, Billings property.

Q. Did you receive any other property as security?

A. Yes. A lot that came through Mr. Morrison in Burke's Second Addition to Seattle, over near Mr. Baker Park.

Witness handed receipt dated September 21, 1910, signed Kilbourne Clarke Company, by witness and was asked if it was the receipt for the property just mentioned.

A. This is not the same property. I think I held it (referring to the property in receipt) for a short time. I never used it turned it back very quickly.

Receipt introduced marked "Plaintiffs' Exhibit 144."

Q. Why didn't you retain the title to the property in this last receipt, Exhibit 144?

A. If I remember correctly, it was that there was a mortgage against it which amounted to about as much as the value of the property, for I have investigated the value of the property. It is in an outlying addition across Lake Washington.

Q. In the receipt the deed is from Bertram H.



(Testimony of E. C. Kilbourne.)

Taylor and George C. Hodges, to blank. Did you mean by that that the name of the grantee was blank in the deed?

A. Yes, sir.

Q. Who filled in the name of the grantee afterwards?

A. I don't know, I turned it back to them, I don't know what became of it after this.

They brought in other property, that they offered to us. I don't know that they brought in any other deeds.

Q. Did you have some dealing with a man by the name of Ezra?

A. I don't remember Ezra, one of the old prophets. There is a man whose name began with E. I think that had to do with that Green Lake property. It don't sound like Ezra. I think his name was Espey, something like that.

Being asked about the property turned over to the Puget Sound Bridge and Dredging Company, answered, I turned over personally a three-quarter interest in 160 acres of land on the ridge between Seattle and Tacoma, west of Auburn.

Witness handed a letter written by him to C. M. Glover, identified, introduced, Plaintiffs' Exhibit 145.

MR. WOOD: I object to that. We never will get to the end of this.

COURT: What do you want to show?

(Testimony of E. C. Kilbourne.)

MR. WILLIAMS: I hold his letter in answer to that, your Honor, which suggests that he trade his land to Hodges for seven per cent twenty year bonds, the same kind of bonds that the Tobey Brothers traded their ranch for, showing his connection directly with trades for these bonds.

COURT: That is written two months after the trade; after he admits he knew that bonds had been traded. Put that in the record if you want to. The only thing the Court can draw from that is that at the time he thought the bonds were good.

MR. WOOD: I think I will withdraw my objection. We would rather explain those things.

We suspended work on the plant up there in September 1910. That was the last work, except we employed a watchman there and did a little work after that, not to amount to much though. We recommenced in 1911, about the 20th of March, completed the work in June 1911. I guess we didn't do any actual work until about the first of April to amount to anything, except making camp, and preparing. We had from six to twenty, men, varied. We put in, if I remember correctly about 80 feet of the tunnel, intake tunnel, that took a great deal of concrete as well as lumber and timber, and we put in the outlet pipe, which was not in our original contract, from the plant up to the canal, about 700 feet, 4 foot pipe. The intake pipe cost between four and six thousand dollars. I don't know but what it cost more than \$6,000,

(Testimony of E. C. Kilbourne.)

somewhere in the neighborhood of \$6,000. I should judge. The cost of the pipe from the pumping plant to the ditch was in the neighborhood of two thousand four hundred dollars including what it eventually cost us. We had to go and regrade the excavation for the ditch, as it had all blown full of sand nearly the whole distance. We estimated that at \$2,000. before we started work, but all of the work cost more than we estimated. The machinery was put in in April and May. At that time we paid the freight and we paid the difference between what we had billed the people the year before. We paid all the bills of the General Electric Company, Delavel Steam Turbine Company, and Rumsey Company for the small pump, Kilbourne & Clarke Mfg. Co., for the switchboards, for the motors and mounting of the Rumsey pump, George P. Adair Company for the pump, the Gray and Barash Company for setting up the switchboard, connecting it, a lot of piping and valves.

We will give you a statement all together it amounted to \$17,000. or a little less.

Q. Didn't you testify before the referee in bankruptcy, in Seattle, that the machinery had already been paid for the year before.

A. I don't think I did.

Q. The Puget Sound Bridge & Dredging Company didn't do any work after 1910, did they?

A. No.

(Testimony of E. C. Kilbourne.)

Q. Then if anything was there while they were at work it was there in 1910, was it not?

A. Sure.

Q. When did the Kilbourne & Clarke Company, quit business?

A. Ended December 31, 1910.

Q. Now, you said that C. A. Kilbourne, furnished to the Kilbourne & Clarke Company about \$72,000.

A. Kilbourne & Clark.

Q. Now, I believe you said the reason for making the deed to him was that your wife wouldn't sign any notes.

A. That was one of the reasons, and also it was immaterial who secured, C. A. Kilbourne, or myself. It was the firm then of E. C. and C. A. Kilbourne on this particular deal, and it would. *and it would* have been practically immaterial who owned it.

Q. Now who was the Kilbourne Company?

A. E. C. and C. A. Kilbourne.

Q. Is it incorporated?

A. No, sir. It is now.

Q. Since when?

A. Oh, about a month ago.

Witness, was asked how much time he had spent on the Tobey ranch.

A. I couldn't right off hand, give the number of months, but have been there a great deal, very frequently, and all winter long, putting in buildings and other improvements. I have full charge of it. The superintendent was under me. The accounts are all.



(Testimony of E. C. Kilbourne.)

kept in the name of the Kilbourne Company, have been ever since we had the ranch.

Q. Who constituted the Kilbourne Company, prior to the time they were incorporated?

A. E. C. and C. A. Kilbourne.

Q. Isn't it a fact that C. A. Kilbourne, pretended to be president of the company, during the years 1911 and 1912?

A. Not only pretended to be but he was.

Q. I understood you that the company had only been incorporated about a month.

A. That is true, but we treated it just the same as though a company, all though it was a partnership, and I signed as vice president, and he signed as president. We had intended to incorporate from the start, sometime when we got around to it.

Witness was asked how much grain they got on the place in 1912.

A. About 47,000 bushels, 2900 acres in cultivation.

Q. Did you get all that off the Tobey Brothers ranch?

A. No, I think the only piece is what is called the Chance quarter, between 100 and 120 acres.

Q. I believe you said Mr. Kilbourne, that you got a piece of property in Burke's Addition to Seattle, from the Columbia River Orchard Company.

A. Yes, sir.

Q. What did you do with that?

(Testimony of E. C. Kilbourne.)

A. Still have it. Still have it in my name. Took it in pay; final settlement.

Q. You still have got that as security?

A. No.

Q. You have got that in addition to the Tobey Brothers Ranch?

A. Yes, sir.

Q. Did you get it before or after the Tobey deal?

A. Before.

Q. And you had the title in your name at that time?

A. Yes, sir.

Q. How did you come to get it?

A. Turned over to us by Mr. DeLarm—The Columbia River Orchards Company. When it was taken, there was no price fixed, but he called it worth \$1,000., Mr. DeLarm did. Went out and had it appraised by the neighbors and got all the way from \$700 to \$1500. according to which man gave the price.

Q. Why, didn't you turn that back to Mr. DeLarm, when you made the Tobey deal?

A. It was part of our deal by which we were to keep it; everything that had all ready been turned over to us previous to that time,—we just sawed off the account at that date, except the agreement to turn back the two Tacoma properties, when they paid the \$7500. to the Bridge Company, and the \$2200. to the Moran Company.

(Testimony of E. C. Kilbourne.)

Redirect Examination.

If Mr. DeLarm, when he got the Clapp mortgage, had realized the full amount and paid the \$7500., over to the Puget Sound Bridge & Dredging Company, as he ought to, then there would have been no lien on the property, would there?

A. That is correct.

COURT: No lien on the Orchards property.

MR. WOOD: Yes, sir on the Orchards' property.

I will show you a statement dated October 31, 1910, with a lead pencil memorandum at the foot, and first I will ask you whose memorandum that is.

A. That is my writing and my initials.

Q. Can you identify that then as a statement which went out to the Orchards' Company?

A. Well, I am not positive that it went to them, but it undoubtedly did, our bookkeeper made it up.

Q. It is your retained copy, is it?

A. Yes, sir.

Q. In your files?

A. Yes, sir.

Q. Examine that and see if there are any credits on that for those later payments that were realized from those various sources, securities and others.

A. Yes, there is a credit memorandum of drayage account \$11.00; Watchman's supplies, \$11.40; salaries \$70.00; Cash, proceeds equity deed Green Lake Addition, \$1,000.00; cash W. E. DeLarm, \$100.; cash

(Testimony of E. C. Kilbourne.)

W. E. DeLarm, \$100. and by cash December 27, 1910, \$350.

Q. Was that after that statement of September there? After that statement of September there were credits given and statements rendered them accordingly?

A. Yes. We gave all those credits on our books; all that I have spoken of, and maybe more that I didn't speak of.

Q. Then I come to this point: That when the settlement was made with DeLarm, speaking in round numbers, with all credits taken, \$43,000. in round numbers was owing your company?

A. Yes.

Q. And after that nothing was received for which he was entitled to credit, is that right?

A. That is right, yes.

MR. WOOD: I offer this in evidence.

Marked "Defendants' Exhibit L."

Q. I will show you duplicate of statement of September 22, 1910, already in evidence, Plaintiffs' Exhibit 135 and ask you who put the acceptance of it as a stated account on the corner?

A. Mr. W. E. DeLarm.

Q. Did you see him do it?

A. Yes, sir, asked him to do it.

MR. WOODCOCK: What is the date of that?

MR. WOOD: It is the same date as yours, and I offer it in evidence.



(Testimony of E. C. Kilbourne.)

Q. From that time did that account bear interest?

A. Yes, sir, and interest was properly chargeable before that time, but our bookkeeper usually neglected to do it.

Q. Then what is the meaning on this statement "Interest not included"? You say you wrote that there (referring to Exhibit L).

A. Because our bookkeeper neglected to put in that interest. Interest was properly chargeable from the dates in the original contract, when they failed to pay—make the payments as agreed.

Q. By the terms of the contract?

A. Yes, sir.

Q. Well, that is in evidence and will speak for itself. Now, there has been some suggestion here on cross examination that seems to me to bear this import; that you claim to have expended in round numbers \$17,000. in doing your supplementary work, but that part of that was made up of machinery, switchboards, the stuff already on hand and paid for by the Orchards Company, prior to that time. Is that true?

A. Well, part of the machinery—the machinery had been charged up to them in part, as far as Kilbourne and Clark had had to pay it.

Q. Representing actual money paid out?

A. Yes, part payments on machinery and—but not the full payment on all the machinery, and there were things in there.

Q. Was there anything in that \$17,000. that didn't

(Testimony of E. C. Kilbourne.)

represent or was that total of \$17,000. actual cash outlay to complete the work according to your agreement?

A. Yes, sir; *that* was no profit put in.

Q. I mean there was nothing put in there that was charged over twice?

A. No, sir; there might have been in this way; there was some lumber and forms, timbers gotten out and charged the year before. When we came to do the work, we found that Mr. Fox, had taken these timbers and used them on his ditch, and we had to buy more new.

Q. Well, that was a new outlay?

A. Yes.

Q. All that I am asking you is this \$17,000. was every cent of it actual honest new outlay?

A. Yes, sir.

Q. You have an interest in this Tobey ranch?

A. Yes, sir.

Q. Now, Plaintiffs' Exhibit 145, is a letter dated May 27, 1911, to Mr. C. M. Glover, at Rock Creek, Oregon, stating that you have examined the 640 acres of wheat, believe it to be a fine tract of land, and that you didn't care to take it but referred their letters to DeLarm and Biehl, Empire Building, Seattle, saying that they bought the Tobey ranch and paid for the same in bonds of the Columbia River Orchard Company." "You might write them addressing," etc. After you people bought in there and became known as having purchased in there, did

(Testimony of E. C. Kilbourne.)

you receive several offers of sale from different people?

A. I thought the whole country was coming down on us for sale.

Q. And you got a great many of those letters?

A. Letters and personal interviews offering property for sale.

Q. And did you make the same answer to all of them that you had referred them to the same people, DeLarm and Biehl, that they might deal in bonds?

A. No. This is the only one that I ever referred to them. He wrote twice to me.

Q. Mr. Glover did?

A. Yes.

Q. Have you got the other letter?

A. I have a copy of it.

MR. ERSKINE WOOD: Have you a copy of it?

A. No, not a copy of Glover's letter. I have a copy of my answer.

Q. (Taking letter) Well this is a little earlier than the letter they have introduced, May 23, 1911. I will ask if that is a true copy of letter you sent to Mr. Glover?

A. Yes, sir.

MR. WOOD: I offer this in evidence, just to complete the transaction; It is not very important.

Marked "Defendants' Exhibit N."

Q. Now, at the time, May 27th, or the end of May,

(Testimony of E. C. Kilbourne.)

at the time you wrote this letter, did you believe those bonds good?

A. Yes.

Q. Why did you think they were good?

A. Because we had practically completed the pumping plant then, Fox was about through with *hid* ditch, well along with it, and it looked as though things were going to be all right.

Q. You thought water would be in the ditch?

A. Yes, sir; we had then the machinery all, in.

COURT: Did you know how many bonds had been issued?

A. I supposed, \$300,000.

COURT: That is what you thought *when* you wrote this letter?

A. Yes, sir; I will state right here, there was something I forgot when they asked me the question; when DeLarm told me he paid \$140,000. instead of \$120,000 bonds, when I learned that, I was interrupted or else I forgot, some additional conversation, which is this: When I protested about his paying such a price for the farm, it wasn't worth it, and he explained, why, as I said, I asked him—I says, “Where did you get your bonds? How did you get so many?” I had in mind all the time he had \$300,000. I wondered how he could get \$140,000. then because I had known of some of his—of his having bought properties for, bonds, he told us about, but he said “Why, I traded for some of the



(Testimony of E. C. Kilbourne.)

bonds, and got them back, and that gave me enough to furnish Tobey Brothers with \$120,000.

Q. Then you didn't know that it was an unlimited issue, based on percentage of securities?

A. No, he had told us it was limited to \$300,000., and that *it* what we had gone on all the time; and the Trust Company was the Washington Trust Company of Seattle.

Q. And you went on with your contract on that ground?

A. We went down to the Washington Trust Company, and I saw John Schram the president, and he said yes, they were trustee for the bonds, and they would not be issued until the mortgages were put up with them, and I further knew Mr. John Schram and Mr. John Clise were both interested in a large irrigation scheme in Billings, Montana, and both understood the irrigation and bond business.

Q. You thought \$300,000. bond issue was the limit?

A. Yes, sir.

Q. That was as high as it could go?

A. Yes, under the mortgage, and was so told by Mr. DeLarm.

Q. Now, I wish you would explain—I won't say to the Court but for my benefit—just what induced you or Mr. C. A. Kilbourne your partner, both of you, to put a second mortgage on that land for \$17,500. Tell how it came up and why you did it.

(Testimony of E. C. Kilbourne.)

A. We were crowding Mr. DeLarm all the time to pay that \$7500 as he had agreed, to the Puget Sound Bridge & Dredging Company.

Q. To relieve the lien?

A. To relieve the lien, and relieve us on the \$7500 because we owed them then about \$25,000. and the Puget Sound Bridge & Dredging Company had a suit *stated* over at Ephreta, to foreclose that lien, and asking for a judgment against the Columbia River Orchards Company and Kilbourne & Clark Company, and they at our request, and at Mr. DeLarm's request, on promises that he would get that \$7500. postponed that suit from month to month, and month to month, until they had gotten what I thought was the limit of their patience, and were going ahead to take out judgment against us. We owed it anyhow, and we didn't want to have a judgment taken out against the Kilbourne & Clark Company. We wanted to keep its name clear, and we owed it, had to pay it, and it didn't make any difference at that time whether we paid the bill ourselves, and then DeLarm owed us, or leave it go and have DeLarm owe the Puget Sound Bridge & Dredging Company, and they jump on us; the money was coming.

Q. And Wakefield should have turned in that money for the benefit of the Puget Sound Company?

A. Yes, sir; a breach of trust on his part.

COURT: Do I understand, Dr. Kilbourne, that the reason you did not follow up this \$17,500, and

(Testimony of E. C. Kilbourne.)

see that it was so paid over, was that you trusted Mr. Wakefield to do that?

A. Yes, sir; and as soon as he didn't do it within a very few days, then we crowded him and went to a lawyer and everything else. The most surprising deal I ever saw in my life.

Q. You expected him to pay \$10,000 to DeLarm and \$7500. to the Dredging Company?

A. Yes, sir.

Q. Mr. Wakefield is any attorney, isn't he?

A. Yes, sir.

Q. As far as you know, did he at that time have a good professional standing?

A. Why, I knew him by sight, and spoke to him on the street for ten or fifteen years, and supposed that while he didn't have much practice, he was all straight. In fact, I had seen him in church lots of times.

Q. That ought to have made you suspicious. Now, up to the time of writing these letters recommending them that they might sell their lands for bonds, had you any knowledge of anything that aroused your suspicions that DeLarm was crooked, and that this think was going to fail?

A. No, Mr. DeLarm inspired perfect confidence.

Q. You don't have any facts in your own knowledge?

A. No.

(Testimony of E. C. Kilbourne.)

MR. WOOD: There was one thing that I might help opposing counsel in.

Q. You shut down work as the Kilbourne Clark Company because you didn't get paid?

A. Certainly.

Q. And you knew you didn't get paid because they didn't have money didn't you?

A. Sure.

Q. And you knew they were hard up?

A. Yes.

Q. And you supposed when you started your work, and the water was going, that was the end of the difficulty?

A. Yes.

Recross Examination

MR. WOODCOCK: If the Court please, I will examine.

COURT: All right, go ahead.

Q. You say, Mr. Kilbourne, that you trusted this all to Wakefield, all that money?

A. We trusted the mortgage and note.

Q. Well the money.

A. We told him what to do with the money.

Q. Well now, you say he defrauded you in that transaction?

A. Yes, sir.

Q. He fooled you, that is he embezzled the money?

A. Yes.



(Testimony of E. C. Kilbourne.)

Q. Well, you didn't make any disturbance about it?

A. I guess we did.

Q. You never had him arrested did you, anything like that?

A. No, we took it to a Mr. Walter McClure, and gave him authority to go the limit, and do whatever he thought best to get the money.

Q. Don't you think that a man who embezzles money ought to be prosecuted, if *the* embezzles money put in his hands?

A. Well, we had a good deal of confidence in our lawyer, gave him authority to do whatever he wanted; that is what the lawyers are for, I suppose.

Q. But you yourself knew, independent of lawyers or anybody else that somebody embezzled your money and misappropriated it he ought to go to jail, or be prosecuted?

A. When I put a matter in the hands of a lawyer in whom I have confidence, I let him have it.

Q. The way you understood, it, from what your lawyers told you, they didn't think you could prosecute him criminally, or anything of that kind?

A. Yes, they thought we could.

Q. You didn't care to do that?

A. No, wouldn't do any good. He hasn't got the money.

Q. Has Wakefield got any property himself?

A. I don't think he has; couldn't find any.

(Testimony of E. C. Kilbourne.)

Q. So you just let the matter rest. He misappropriated over \$7500, of your money, and you let it rest at that? Without trying to get it, either in a civil way or in a criminal prosecution?

A. The thing isn't through with yet. There are other things entering into it that you may not know of, that I don't care to develop in court, because there is another suit coming up on that question.

Q. But up to date, you haven't made any disturbance about that?

A. That is your testimony.

Q. What is that?

A. That is your testimony.

Q. I ask you.

A. No, you didn't ask me. That is what you said.

Q. You haven't made any disturbance up to date?

A. We think we have.

Q. Now, Mr. Kilbourne, in reference to the other matter about the bonds, you say that as far as you knew, the bonds were all right. Now, isn't it a fact that up to the time of the Tobey deal, you knew that the DeLarm outfit and all their institutions were broke, and couldn't raise money?

A. They kept Mr. Fox going \$5,000. a month.

Q. Well, you couldn't get your money out of them, could you?

A. Well, the reason was very often because Fox was a better collector and he got it.

(Testimony of E. C. Kilbourne.)

Q. Well, I am talking about you.

A. Why, yes, the facts are — — —

Q. Your firm was practically broke, along with the other firm You couldn't raise money to carry on their business account of the fact — — —

MR. WOOD: I don't know why counsel says these people were broke. I don't see why counsel injects in the question something that hasn't appeared—that Kilbourne and Clark were broke.

Q. That is what I want to find out. I think they were. That is the reason I ask the question. Isn't it a fact your company was hard up and very much embarrassed on account of the fact that you couldn't get money out of DeLarm?

A. DeLarm was only one out of a dozen in the same fix.

Same kind of institutions, that were hard up all along the line; half a dozen others. It was general.

Q. That was one of the items, though?

A. Sure that was one of the items.

Q. But your company was in the same—that is, you were hard up, and threatened *with* your creditors, and you couldn't raise the money you needed to carry on your business?

A. Well we weren't threatened by any of our creditors.

Q. Isn't it a fact that you were very much embarrassed financially about the time this Tobey deal came along?

(Testimony of E. C. Kilbourne.)

A. I don't know—we were short of capital; no question about that.

Q. Now, you knew this, Mr. Kilbourne, didn't you? That the DeLarm outfit; and all their institutions, didn't have any money; that is, if they did have any money, it wasn't in sight where you could get it?

A. Well, they had spent a good deal of money.

Q. And didn't you know further that the only way they could acquire property would be by handling these bonds?

A. Oh, no; they acquired a larger part of their property in other ways. The Billings property, Mrs. Billings herself told me she gave an exchange for land over in Wahluke, Mr. Reinmouth told me that property at Reinmouth had been exchanged for land over at Wahluke.

Q. That is trading one property for another?

A. It was for land under the project at Wahluke.

Q. But at the time of the Tobey deal, isn't it a fact, as far as your knowledge goes, that the DeLarm outfit, didn't have any money to buy property with?

A. I don't know. It was presumption on my part — — —

Witness interrupted by objection as not proper recross.

A. I can volunteer the information that the Morrison *place* of property, that lot out in Burke's Second addition was acquired with bonds. I knew that



(Testimony of E. C. Kilbourne.)

from Mr. Morrison. I knew these two Tacoma properties were acquired by Wahluke property, from the people themselves. Mr. Rienmouth and Mr. Billings.

Q. But you wouldn't take the bonds yourself for your pay?

A. We weren't in the bond business. We were in the contracting business, and it is our fixed policy not to take any property, bonds, or anything else for our contract.

Q. Isn't it a fact, Mr. Kilbourne, that Mr. Fox, has foreclosed a lien upon the Wahluke project for something over \$32,000?

A. I understand so. I was in the court when he started his foreclosure.

Redirect Examination.

Q. You afterwards did buy the Glover land, didn't you?

A. Yes, sir.

Q. I wish you would just state briefly why you bought it after you had written him the letter that you didn't want it?

A. Mr. DeLarm came in about a month after that, a month or two and said—asked—says—"I would like to sell you 840 acres of land" I says, "We are not buying land" He says, "Well, it joins your ranch" I said "Where?" He said, "It is the Glover land", I said, "You got that" He said, "Yes." I said, "How did you get that and when?" And he

(Testimony of E. C. Kilbourne.)

explained that they bought it with their bonds, and then wanted to sell it to us. The first thing he said, before all this, he came in and said, this "We have got 840 acres of land adjoining yours. Can you take it to the Puget Sound Bridge & Dredging Company, and ask them if they will accept that and release that lien?" I said "All right. I will try and see." And I went up and called on Mr. Hedges, president of the Puget Sound Bridge & Dredging Company. He said, "No, what we want is the 'mon'," *if* the expression he used, and I went back and told Mr. DeLarm that, and then he wanted to know if we wouldn't buy it and I told him we had nothing to buy it with, "Well," he says, "we owe you. We owe Mr. Kilbourne, \$2950. I will take that, and you have an engine which we want to use over there on our auxiliary plant, and you have a motor boat on Lake Washington, haven't you which we want to use to run from Kennewick and Pasco, to Wahluke" I said yes. Well, he said, "You have some other machinery, haven't you, some dredging machinery and steam turbines?" "Yes." He seemed to know about those. He was starting to finance a company for the Nometric Dredging Company. That is how he found that out; but the upshot of it was that we told him that if we could get the Puget Sound Bridge & Dredging Company to accept that land as security, and give us time, we would pay it if we could agree upon terms. And we went over the machinery and every-

(Testimony of E. C. Kilbourne.)

thing we had, to make a trade with him; and I made four *or* five different memorandums of the stuff, and then I saw Mr. Hedges again, and he said that he would send Mr. Dyer, the Vice-president of their company, up to the examine the land, and if it satisfied Mr. Dyer, they would accept that as security, and give us additional time, but wouldn't agree as to just what additional time. I think he said he would put it over until September. This was the latter part of June or the first of July. The result was they sent up Mr. Dyer, he was over building the Clackamas dam, and went up and examined it. and it was deeded to Mr. Dyer, but we paid for it. It is up now in the Puget Bridge & Dredging Company's hands as security.

Whereupon proceedings herein adjourned until 10 o'clock tomorrow morning.

Portland, Oregon, Saturday, May 17, 1913, 10 A. M.

E. C. KILBOURNE. Resumes the stand.

Redirect Examination Continued.

(Questions by Mr. WOOD.)

Did you purchase other lands than the Glover lands, and purchase with money?

A. Yes, sir.

Q. Adjoining these Tobey lands?

A. Yes, sir.

Q. How *dod* they compare in character of soil and location?

A. Practically the same.

(Testimony of E. C. Kilbourne.)

Q. And what did you pay for these additional lands?

A. We bought 1440 acres of Mr. J. B. Garrison, Jr., and paid \$10.87 an acre for them.

Q. What time was that you bought?

A. That was in May, 1912.

Q. And did you buy any others?

A. No only that 840 acres that we spoke of yesterday.

Q. What was the name of the ten hundred and something acres?

A. J. B. Garrison, 1440 acres.

Q. Why did you buy these 1440 acres from Garrison?

A. Several reasons. One reason we had an excessive amount of moisture that year and everything was looking fine, and it looked as if we were going to have a bumper crops, and we felt we might possibly be able to pay for that land, or a large part of it, as we had it on easy payments, out of the land; and we had always kept this one thing in mind, that eventually we expected to put water from Rock Creek, onto the land, and it required a large enough amount of land to carry through such a project as that; you can't do it with a small piece of land.

Q. And how about reducing the average overhead charges?

A. Oh, that is another matter too. Our overhead charges and my expense and superintendence and



(Testimony of E. C. Kilbourne.)

a great many other items would not be any more for the 7,000 acres we were now handling, than the 4300 previously. In fact, you have to have large areas there in order to make things pay.

Q. You didn't write the letter to *Nott*? I think that was C. A. Kilbourne?

A. Yes, No, I didn't write it.

Q. Well, I will take that up. Those are the only things you acquired?

A. Yes, sir.

Q. Although numerous others were offered you?

A. Oh, we had lots of land, offered all the way from \$12.50 to \$15. an acre. That gentleman that was on the stand here, Mr. Ralston, recently offered us 200 acres for \$3,000. just recently.

Q. Now, you said that DeLarm, if I remember correctly, told you that he what you consider, or understood, was a bond issue of \$300,000 practically sold in the east.

A. Yes, that was right on the start of our first conversation with him in regard to the contract. That is after—at the time when we were drawing up the contract.

Q. Did you follow that up afterwards with him, to find out if they were sold, why the money wasn't forthcoming?

A. Well, I did, even before, that, he showed me letters and telegrams showing that the parties from the east, the engineer and attorney and one other

(Testimony of E. C. Kilbourne.)

member of the company, would be in Wahluke on such and such days to examine the property, and then he told me, in the course of the conversation, that Mr. A. L. Funk, a financial broker in the Pioneer Building, in Seattle—a man who stands well there—was the broker through whom he was dealing. I therefore went to Mr. Funk, and Mr. Funk confirmed everything that Mr. DeLarm had said. Then later, two or three months, I think it was, when the money was not forthcoming, I asked Mr. DeLarm why the Trust Company back in Chicago didn't furnish the money. I knew they had *come* one there and made their examination and had time to get their report in; and he gave me some reasons, fixing up titles etc., so I went to Mr. Funk, again. I said, "Mr. Funk, how about this? You said these bonds were practically sold. Why isn't the money forthcoming? I understand from Mr. DeLarm that the report of the engineer, and everybody that came out from Chicago was entirely favorable." He said "Yes, that is true," and he says, "Just as soon as Mr. DeLarm does the things that are required of him by the engineer and attorney, the money is ready."

Objected to as hearsay and the Court directed witness to state the result, not the details of it.

Q. Well, just state the result of what Mr. Funk told you.

A. The result was, I asked him what were the

(Testimony of E. C. Kilbourne.)

things that were required of the Columbia River Orchard Company, before they would get their money, and he gave me a list; Secure the right of way; the deed from the Northern Pacific for the right of way and the pump house site, and clear up several things in the way of titles, and one thing and another that are necessarily fixed like that; I went to Mr. DeLarm and I said, "Why don't you go ahead; get a move on you and do these things?" I said, "I am going over to Tacoma on another matter and I am going to see Mr. Plummer anyhow, and will see if I can't get these deeds for the right of way." He said "All right, you go ahead and do that. You attend to that end of it, and we will do those other things, and we will get the thing through as quick as possible." That is why I went to see Mr. Plummer at that time.

Cross Examination.

Q. This \$300,000. bond issue you have been testifying about, DeLarm, told you about that when you first entered into the contract of 1910, didn't he?

A. Yes, sir. He said that was about the proposed amount of bond issue, before that was had.

Q. And this Tobey deal occurred over a year after that?

A. Yes, sir.

Witness was handed a letter dated March 27, 1911, identified as one written by the witness, but not his signature, but a copy.

(Testimony of E. C. Kilbourne.)

Q. You had a conversation in February, 1911, over the telephone with H. S. Wells, of the Pacific Power & Light Company, in regard to furnishing the power, did you not?

A. Yes, sir.

Witness handed letter written by Mr. Wells, and identified.

Witness said the subject matter is familiar to me, introduced, "Plaintiffs' Exhibit 146.

Q. Now the Pacific Power and Light Company, refused to enter into a contract with the Columbia River Orchard Company.

A. No, they stood ready at all time, to do so, they do now.

Q. Why didn't they enter into the contract then, if you know?

A. The last thing I know about the negotiations they were going to. After we had completed the plant in 1911, I understand from Mr. Anderson, that they stand ready now to furnish him power at any time that he is ready for it.

Redirect Examination.

Asked to state the phone conversation, with Wells.

A. I was engineer for the Columbia River Orchards Company on its pumping plant, and all the work connected therewith, I negotiated a contract for power with the Pacific Power & Light Company. I negotiated first with the Hanford Power & Irrigation Company, who were the predecessors and this



(Testimony of E. C. Kilbourne.)

is part of the negotiations, and at that time arrived at a contract which was drawn up and signed, but they required, the Pacific Power & Light Company did, a guarantee that their bill would be paid, and the expenses for running an expensive power line down there would be—they would get it back having their bills paid, and they therefore asked the Columbia River Orchards Company to put up some property, and they did. They offered 200 acres of land, I think it was down in Jefferson County, which they had purchased from Mr. Morrison with their bonds, and it was regarding the title of that land, if I remember correctly. They said *theyt* they hadn't gotten the abstracts, or something of that kind. That is, it doesn't show in that letter but later. They had turned over the description of the property etc., but hadn't turned over the abstracts.

Now this letter says, "The question whether we can accept these or not will depend on our receiving a report on the holdings of the said company. In this statement of their holdings, we would like to know just what title they have to the land, and if they do not have a clear title, what incumbrances there are. As soon as we can get this information we will advise you definitely what we can do. I read from Plaintiffs' Exhibit 146." Now, what was done to further advise them on this?

A. I don't know what land they refer to there,

(Testimony of E. C. Kilbourne.)

but *the* required some property as security for their bill.

Q. Yes, you have said that, but I mean as far as you know, what was done in further compliance with this letter?

A. We furnished abstracts to Kerr & McCord, who were the attorneys of the Pacific Power & Light Company in Seattle, on some land down in Jefferson or Clallam County.

Q. As far as you know, were they satisfied and ready to go ahead, the Pacific Power & Light?

A. I don't think they were satisfied with the value of the land at that time.

Q. You said they were ready to go ahead?

A. Oh, they have been at all times.

Q. Under what condition?

A. That enough security is put up to guarantee their bill. for a year or two.

Q. What did you have to do with the Orchard Company's securities?

A. Nothing whatever. I just simply, anything of that kind, turned the letter over to Mr. DeLarm. I was making the contract for power.

Q. It was simply done to get a power contract?

A. Yes, a part of my business.

Recross Examination.

Q. You knew all the time they weren't able to put up security sufficient to satisfy this Power Company?

(Testimony of E. C. Kilbourne.)

A. I didn't know any such thing.

Q. I will ask if you didn't call upon the Columbia River Orchard Company, in reply to Mr. Wells' letter for a statement of their property and title?

A. No, no more than turning over the Wells' letter or something of that kind.

Q. I hand you a letter directed to the Kilbourne & Clark Company, of February 10, 1911; examine it, and see if it doesn't refresh your memory on that point. Do you remember their writing you such a letter?

A. I had forgotten it, because I passed all such matters over to Mr. DeLarm, if anything in regard to the company because I didn't write the letters. I turned that letter that you handed me first, probably over to DeLarm, and that is the reply to it.

Q. And how did it come that they sent this reply to Kilbourne & Clark Company?

A. Wells.

Q. No, the Columbia River Orchard Company?

A. Oh, naturally, because I had received the former letter. I presume. I have no carbon copy of having written any letter to DeLarm; don't think I ever did in relation to it at all.

Q. They wrote this letter to you then, in response to Wells' letter?

A. I presume so.

Q. You remember receiving such a letter?

A. No, I don't, but presume I did. That is a mat-

(Testimony of E. C. Kilbourne.)

ter that I don't retain in my mind, because it wasn't part of my business. I retain those things that I have to do and do, better than mere statements of things like that. What I observe or have done, accomplished, why, I remember pretty accurately. Those things that I haven't to do with, like that, I don't.

**[Testimony of S. B. Hill, for the Defendants.]**

S. B. HILL, called as a witness for defendants, being first duly sworn, testified as follows:

(Questions by Mr. ERSKINE WOOD.)

Witness' qualifications as to expert engineer were admitted by counsel.

I was a witness for the government in the Bieh case. I had already prepared a report for Mr. McCourt, and that was the reason I was called on account of being familiar with the situation there (referring to the Wahluke project), having gone into it sometime before that. I made this report at the request of certain clients of mine who were desirous of knowing the exact condition, financial condition and work that had been done there and its value. Made a careful examination of the power plant and the intake, etc., and machinery.

I went over the ground and made a careful examination of all the existing work and construction. I might say that the pumping plant constructed, appeared to be first-class. It was a very nice piece of



(Testimony of S. B. Hill.)

work thru out and the machinery was of the best for the purpose intended. All high class construction throughout, and well built.

I am familiar with conditions more or less along the Columbia River there. The tide, the rise and fall of the river and conditions that have to be met under constructions of that kind. I made an estimate of the probable value of that, duplicate of that. and the construction down there under normal conditions would be \$50,000., but under the conditions met there and having to take care of the rising water and the forced construction, the provision of extra pumps etc., it might range around \$10,000. or \$15,000. in excess of that.

No cross examination.

[Testimony of Frederick G. Simpson, for the Defendants.]

FREDERICK G. SIMPSON, witness called on behalf of defendants, being first duly sworn, testified as follows.

(Questions by Mr. ERSKINE WOOD.)

Occupation electrical engineer, have been such about seventeen years, was in the employ of Kilbourne Clark Company. At the time this work was done, *was* Chief Engineer. I designed the plant and was chief engineer in charge of its construction.

The quality of the work was the very best in all respects. I had charge of the work during the time

(Testimony of Frederick G. Simpson.)

of Kilbourne Clark Company, not under E. C. and C. A. Kilbourne. I had nothing to do with that firm. During my time, the cost ran between forty and forty-five thousand, roughly. I OK-d, the statements and pay-rolls, and sent them down to the auditor. I did not make the completion myself, or have any direct knowledge as the result of such completion.

Q. Are you in the employ of Kilbourne & Clark now?

A. No, am general manager of the Kilbourne Clark Manufacturing Company, of which Mr. C. A. Kilbourne, is officer and stockholder.

Q. Can you identify these blue prints I hand you?

A. Yes, these are blue prints made in my office when I was shief engineer for the Kilbourne & Clark Company, and are drawings for the plant at Wahluke, or near Wahluke?

Q. Just describe the plant briefly, without reference to these prints.

A. The plant originally designed consisted of a reinforced concrete building, the floor of which was 17 feet below the mark which we regarded as extreme high water in the Columbia River. This building housed—was to house two units, two pumping units, each unit to consist of one electric mortor and two pumps. The pumps would be connected to each end of the shaft of the motor. Each one of these pumps had a normal capacity of 5,000 gallons of water per minute, making 10,000 gallons of water

(Testimony of Frederick G. Simpson.)

per minute per unit, pumping against the maximum head of 91 feet; the actual head above extreme low water in the Columbia River, as we formed our observations regarding it was 91.26 feet; from extreme low water point in the Columbia River to the upper end of the discharge pipe, where it expanded into the canal. The work coming under my jurisdiction included the design and erection of this building, the selection of the pumping units, the pipe line from the building to the canal; afterwards in connection with the serving of the station with electric power; I provided triangulation of the Columbia River. There was no survey of the river at that point available, to find a course to run for power lines of the Pacific Power & Light Company.

Q. I just wanted a bried description of the pumping plant itself; that is almost too much in detail.

A. That is the description of the pumping plant as it was.

Blue prints introduced in evidence, Defendants' Exhibit O.

[Testimony of A. B. Graham, for the  
Defendants.]

A. B. GRAHAM, witness called on behalf of defendants being first duly sworn testified as follows.

(Questions by Mr. ERSKINE WOOD.)

I reside in Seattle, lived there over 21 years. I am in the lumber business, manufacture of lumber. Platted an addition to Seattle. Had dealing in the Columbia River Orchard Company bonds. I traded some land in the A. B. Graham University Tract or Addition for these bonds, at par, on the basis of the printed price or cash price of the land on sale at that time. I made one trade with Biehl and DeLarm, and one or two others following that. With DeLarm and Biehl, was March, 11, 1911. A whole block was traded, 24 lots. The selling value of the lands was in the neighborhood of \$750, a lot. We were selling lots for that money, all upon a printed price list made before the sales began. Sold for cash, all except those traded, this one trade or two trades that I made. I think I have \$31,000. in bonds, which I got in two trades. I made *there* at par. In the first trade I think there were \$17,000 at par, the second time in round figures \$14,000. or \$31,000, all together. Both were at par. The terms of the second trade were the same as the first except I think there was a mortgage on a few lots in the second trade. I traded, an equity, a blanket mortgage with a release clause of something like \$300. a lot. In the second trade I think there



(Testimony of A. B. Graham.)

was something like a block, but the difference between that and the mortgage cut it down so that it run up in round figures something like \$14,000.

Q. Can you state in the aggregate what the approximate amount of sales you made in your addition for cash?

A. Something like \$250,000.

The date of the second trade was April 1, 1911.

Asked about his standing, witness answered.

A. R. G. Dunn & Company and the Bradstreet Company, give me the best rating that is given anybody. A-A, A-1. Whether I am entitled to it or not.

I have known the Kilbournes over 20 years. I didn't know C. A. Kilbourne as long as that. I have known the Dr. E. C.

Q. How long have you known C. A.?

A. Well, I don't know that I can say. I don't know that I met the doctor when I first went to Seattle, in '91.

Q. What is their reputation for business integrity?

A. Good.

Q. Do you know of your own knowledge, whether these bonds were generally regarded during February and March 1911, as of par value and a good many trades made?

A. There were quite a number of trades, and as far as I was able to ascertain they were alright. I

(Testimony of A. B. Graham.)

think the series of bonds I got was what they call the second series—February.

Witness produced a memorandum and testified.

A. I think they were issued in February, sometime in 1911; the interest became due in February 1912.

Q. What interest did they bear, Mr. Graham?

A. Eight per cent.

Q. Are you quite sure about that interest?

A. That is my recollection.

Q. The reason I asked you that is that I think the February bonds bear 7 per cent, and it was the first issue that bore 8 per cent.

A. Perhaps that is right.

Q. What have you done with your bonds?

A. Why, I turned them into this other company, and took stock in the new company.

Cross Examination.

I got preferred stock in the new company for them. I didn't pay any cash, I turned in the cancelled \$9,000. worth of notes. I held notes against the parties who owned 240 acres of land there, and they deeded that to Mr. Anderson for the company in lieu of my cancellation of the \$9,000. notes.

Q. How much was the stock in the new company?

A. \$100,000 in preferred, and \$900,000 in common.

Q. Did you know what was behind these bonds when you traded for them?

A. I had the statement of Biehl & DeLarm.

(Testimony of A. B. Graham.)

Q. And you relied upon their statement?

A. Up to a certain extent. They referred me to Mr. Hodges of the Trust Company here in Portland, whom I afterwards, or at the time, wrote to him, and he wrote me back the assurance that he had the security \$125. for every \$100 of bonds issued, and that there was no way possible that I could be beaten out of my money on these bonds, and that they were certain to be retired within seven or eight years from the time of the issue.

Q. Did they refer you to the Kilbourne Clark Company?

A. No, sir.

Q. Either of the Kilbournes?

A. No, sir.

Q. Now, isn't it a fact, that you relied upon this statement in making this deal?

A. Not entirely. I went to a number of other people.

Q. How did you come to go to the other people?

A. Well, because they were trading in them at the time.

The addition that these lots were in that was traded was an addition that was platted in my name, A. B. Graham University Addition. The equities were in the same addition, 40 acres, out at the University where the public library is on one corner of it.

[Testimony of William F. Howe, for the  
Defendants.]

WILLIAM F. HOWE, witness called on behalf of defendants, being first duly sworn, testified as follows:

(Questions by Mr. ERSKINE WOOD.)

Residence, Seattle, Washington, lived there 10 years. Am in the real estate and investment business. Was familiar with the general value of the Columbia River bonds, on the Seattle market in March 1911, and February 1911. I was trading my own property for them at par. Made a large number of trades (Referring to his book). On February 4, 1911, I exchanged a lot that I valued at \$1200, and took \$1200 worth of bonds of the February issue 1911. I sold a desert relinquishment claim near Knappton, that had cost me \$1500, I took \$1400 of Columbia River Orchard bonds. These were all the old issue of 8 per cent bonds. On February 8th, I exchanged four lots in Port Angeles, in the original townsite for \$2,000. of the bonds. I valued the lots at \$2,000. On February 14, I exchanged a 10 acre tract of fruit land near Ephrata for \$1,000. of the bonds. I valued the lots at \$1,000. The bonds were all I think if the February issue at that date.

Q. All except that one that you mentioned?

A. Yes, sir.

On February 15th I exchanged ten acres of land on Locust Island, and 40 acres of land near Fort Ludlow.



(Testimony of William F. Howe.)

valued at \$2800. and took \$2800. bonds. On February 16th, I exchanged a twenty acre tract of fruit land near Winchester, valued at \$3,000. and took \$3000. bonds. On February 16th I exchanged a lot in H. S. Turner Park Addition, Seattle, receiving 200 bonds and ten shares of stock in the Yakima Moxie Company, and a mortgage back on the lots for \$500. that being valued at \$1700. On February 20th, I purchased two and a half acres on the east side of Lake Washington, opposite Seattle, valued at \$1400., and gave \$1400., in bonds.

MR. WOODCOCK: I don't see, if he knows the market value of the bonds, why he should go, all through this.

MR. WOOD: Well, if you have enough, I have.

A. There were thirty or forty more deals, that I had.

Q. What was the general market value of the bonds then, Mr. Howe, at that period you have covered?

A. For the first four months of that year, par.

#### Cross Examination.

(Questions by Mr. WOODCOCK.)

Q. Who were buying bonds at par, outside of this trading?

A. They were not selling for cash. I didn't mean to convey that impression.

Q. They couldn't be sold in the market for cash?

A. There couldn't anything.

(Testimony of William F. Howe.)

Q. What did you do with the bonds you got?

A. I used them simply as a circulating medium, as we used to use the bank certificates, when we were on a basis that there was no cash, and I used the bonds. First I exchanged my own properties for bonds. I then would use the bonds and acquire more property. I then would trade that property for more bonds and simply use the bonds in lieu of money.

Q. You finally then got a lot of the bonds by trading them for other property?

A. No, I got rid of my bonds, because several months after the time that we are discussing here the market value of the bonds went down, and as they commenced to decline, I exchanged my bonds with brokers in Seattle, and acquired real estate and held the real estate rather than the bonds.

Q. Did you know what was behind those bonds?

A. Well I made as careful an inquiry as I felt a business man could make under the circumstances.

Q. Now, if it is a fact that the companies issuing these bonds didn't have any property in their own name; that is, only options and property of that character, and nothing where they had absolute title, and you had found that out, would you have taken the bonds?

A. I didn't find that out, and that was not given to me as being facts in the case.

Q. Well, you have learned since then about what the facts were?

(Testimony of William F. Howe.)

A. Yes, but I didn't know it at that time.

**Redirect Examination.**

(Questions by Mr. ERSKINE WOOD.)

Had you know the Kilbournes previously to this?

A. Not personally; no, by reputation.

Q. Do you know their general reputation?

A. Yes.

Q. What is it?

A. Strictly first-class.

**[Testimony of Walter S. Wade, for the  
Defendants.]**

WALTER S. WADE, witness called on behalf of defendants being first duly sworn testified as follows.

(Questions by Mr. ERSKINE WOOD.)

My business is merchandising and farming at Olex, Oregon, in Gilliam County. I have lived in Gilliam County, going on ten years. Been engaged in farming all that time. In the immediate vicinity of Olex I have no land; but we have in the neighborhood of four or five thousand acres about ten miles from there. I know the Tobey Brothers land that the Kilbournes are now farming. Know it very well. I believe I would be a fair judge of what land ought to be worth there, what it is worth a fair market value of the Tobey Brothers land. I think \$15. an acre.

I farmed the land two years, as a tenant. I assumed a contract of other parties than myself. The

(Testimony of Walter S. Wade.)

financial result from the operation of the land was that we made a loss in the neighborhood of \$7,000. 1909 there was a scarcity of rain fall; we had no rain, and it resulted in a crop failure. 1910, we recovered some loss. Between the years 1907 and 1912 the crop conditions there haven't been very good. They have been very poor.

### Cross Examination.

Q. Now the \$15. you say land is worth is that on a cash basis?

A. I think that is as much as any land was ever sold for in that vicinity. That I know of. The land adjoining the Tobey Brothers was sold for \$15. cash.

I presume it was in 1908, as near as I can remember it was bought by R. T. Cox here at Portland, for the Inland Investment Company. They paid that cash for the land in 1910.

Wheat and barley, we raised something like 14500 sacks. Measured a little better than two bushels to the sack. I think there was fully 30,000 bushels raised that year on about 2100 acres. The price that year was between 70 and 75c and barley ran \$20. a ton. I couldn't tell exactly how much of the 30,000 bushels was barley.

Our expenses in 1910, was around \$10,000. Ten or twelve, I couldn't say. We hired everything done. Every man that worked on that place was paid wages.

Q. If you had been doing it yourself you could



(Testimony of Walter S. Wade.)

have done it considerably cheaper than that couldn't you?

No, not unless I had a family of boys, a man that has his own help, of course could save that.

1912, was a good crop, better than an average crop. In 1912 all over Gilliam County, as a rule, it was better than 1910.

**[Testimony of H. S. Wells, for the Defendants.]**

H. S. WELLS, witness called on behalf of defendants being first duly sworn testified as follows:

Present occupation, new business manager of the Pacific Power & Light Company. I am manager for new business.

Q. What was your business in February 1911?

A. I can't remember the exact date, it was either assistant new business manager, or new business manager. The change came about that time.

Letter of February 17, 1911, addressed to Pacific Power and Light Company, signed Columbia River Orchards Company, by W. E. DeLarm, President, identified and introduced in evidence, "Defendants' Exhibit P."

[Testimony of J. W. Todd, for the Defendants.]

J. W. TODD, witness called on behalf of defendants, being first duly sworn, testified as follows:

I reside at Seattle, lived there 7 years. Business real estate.

Q. Do you know anything about the value of Columbia River Orchards bonds, in the early part of 1911?

A. Yes, sir. Made trades for them. The first trade I made for them was an equity in a lot in the heart of the City. The equity was valued at \$35,000, and I took \$35,000 in bonds for that. The lot was on 4th Avenue, between the Smith Building and the City Hall in the center of the City.

Q. How did you base your value of \$35,000 on it?

A. That is what it was valued at and sold for that before I got it. That is what I paid for it. In fact I paid a little more for it, but I got it right in the heart of the boom.

Q. A mortgage on the lot and you held the equity?

A. Yes. The bonds I traded were Series A. February bonds, and I made the trade about the middle of March 1911. I don't suppose I investigated as thoroughly as I should, but I made quite a little investigation. Had my attorney look them up and made quite a little inquiry. The lot has sold a number of times since, about that price.

(Testimony of J. W. Todd.)

Cross Examination.

I haven't got the exact date in March, (referring to the trade). I don't remember who the deed was made to. I think it was a blank deed.

Q. Whom did you deliver it to?

A. I believe it was Nutter & McClure, brokers. I think they delivered me the bonds.

Q. What did you do with your bonds?

A. I traded them for other property at various times. I made lots of trades. I couldn't give you the dates; traded for other property, and traded other property for bonds, and kept them moving.

Q. Where did you get your information in regard to the value of the bonds?

A. Various parties. I got some information from Dr. Howe, and I had my attorney look it up, and then I got some information from the Washington Trust Company of Seattle. They acted as trustee for the company in the first issue, on their eight per cent bonds, and I got some information from them. They said that it looked very favorable, although they didn't *xare* to handle it any longer; that if they got through thirty days, why the company would be all right.

Q. Which bonds did you get? The original issue of 1910, or those of 1911?

A. The Series A. February, 1911.

Q. Did you know personally what was behind the bonds?

(Testimony of J. W. Todd.)

A. Not personally, no, sir.

Q. Did you inquire what was behind them?

A. Yes, sir.

Q. What did you ascertain was behind the bonds?

A. I ascertained that there was \$125, behind every \$100, bonds.

Q. \$125. in what?

A. In securities, mortgages.

Q. What kind of mortgages?

A. Well, I didn't inquire what kind of mortgages.

Q. Did you learn any different later?

A. Later, yes, sir.

Q. What did you learn later?

A. That there wasn't much behind them; at least they were so far behind then that it wouldn't do any good anyway.

[Testimony of H. P. Nolan, for the Defendants.]

H. P. NOLAN, witness called on behalf of defendants, being first duly sworn testified as follows:

(Questions by Mr. C. E. S. WOOD.)

Business Real estate business. Live in the City of Seattle. Lived there in January, February and March, 1911, have lived there continuously for nine years.

In the year 1911, was in the real estate business.

Q. Did you ever deal in the Columbia River Orchard bonds?

A. Yes, sir.



(Testimony of H. P. Nolan.)

Q. What was their going value in the Seattle market in January, February and March, 1911?

A. Par.

Q. Did you ever take any steps to investigate the value of the bonds?

A. Oh, yes. I obtained a statement from the Columbia River Orchard Company, *if* their condition. (produces statement). And they furnished me not only with a statement but with copies of their prospectus for the purpose of handling their bonds.

Q. Were you to handle them?

A. Well, they wanted me to handle them, that is, for others and on my own account for my own property, and I did that. I sold my own property for bonds at par.

Q. This statement bears date January 27, 1911, was it received at that time?

A. I think it was received the next day.

Introduced Defendants Exhibit Q.

They furnished me with a copy of their prospectus showing physical condition of their property there, and upon investigation I found that much that they stated was true. The land was as this prospectus showed.

Q. And you say you sold some of your own land for bonds?

A. Yes, \$30,000. worth.

My property was in the City of Seattle. It was in several pieces. There were three of them that

(Testimony of H. P. Nolan.)

were improved, incoming producing property and there were four of them that were vacant. I took bonds at par for the mortgage value of my property.

Q. Did you have anything to do with any other deals in these bonds?

A. Yes, sir.

Well, I induced Mr. L. S. Morrison to sell 600 acres of land that was clear of incumbrance at \$30. an acre, which was the market value of his land, for bonds at par. That is the land that was tendered the Power Company as security for rent, and that was the proposition—the purpose of getting that land was to put that up with this Power Company as security for the payment of the monthly rental for power.

Q. Did you have any connection with the deal between the gentleman who has just left the stand, just preceded you?

A. Mr. Todd?

Q. Yes.

A. Yes, I represented the purchaser.

Q. What was that deal, and what did you have to do with it? And state the time, the date.

A. That was March 18th, 1911. That was a lot 60 feet by 111 on Fourth Avenue, within a block and a half of the new 42 story Smith Building there, and it was sold at \$75,000. for Columbia River Orchard bonds, and it was a low price for the lot.

Q. Go ahead.

(Testimony of H. P. Nolan.)

A. This lot is directly across the street from two lots the City of Seattle paid \$85,000. apiece for, for their own use. That is where they are going to build a court house; that is across the street from this lot.

Q. Go ahead.

Q. Well, Mr. Todd sold that lot for \$75,000.

Q. What did he take in payment?

A. Columbia River Orchard bonds.

Q. At what valuation?

A. Par.

Q. Now did the personal attorney for DeLarm and the Orchards Company, Mr. Green, hold any of these bonds?

A. Well, the only knowledge that I have that he did is that he loaned DeLarm \$2,000. in cash, and *took* Columbia River Orchard bonds as security for the note. I have a copy from the United States Court of Seattle—certified copy, with a copy of the note and copy of the bonds, that was Mr. Green's claim against the bankrupt. I think it was March 20, 1911. It *was* March 20, 1911.

Q. And the amount of it ?

A. \$2,000.

Q. What other transaction about this time were you personally acquainted with, in which bonds were taken for properties, at par?

A. Well, I had several dealing with Mr. Howe who was on the stand, in which Mr. Howe traded in

(Testimony of H. P. Nolan.)

property for, bonds. I had some other dealings with Mr. *How*, where I traded him property for bonds. They were a common medium of exchange in the City of Seattle during the months of February and March.

Q. At par?

A. Yes, sir.

Q. Were you the special and authorized "totor" for DeLarm & Company, or in the general business?

A. I was in the general business of handling stocks and bonds and real estate.

Q. You had no peculiar relation to him or to the company?

A. No.

Q. Was anybody else connected with you in the dealings—in Mr. Todd's dealings?

A. Oh yes, there were several brokers and individuals.

Q. Well, name some of the individuals of standing there?

A. Well, T. C. Nutter of Nutter and McLean, and United States Marshal up there, Mr. J. R. H. Jacoby.

Q. Were they men of good integrity and business standing of Seattle?

A. Oh, yes.

#### Cross Examination.

(Questions by Mr. WOODCOCK.)

Q. How do you brokers do when you get bonds? Do you investigate the backing of the bonds, and find out whether they are good or not?



(Testimony of H. P. Nolan.)

A. Why, certainly. Before any reputable broker handles a bond, he finds out who issues it, and what is behind the issue, duration of the bonds, and a lot of things.

Q. What did you do now as a broker, knowing your custom, as you said, to determine what was behind these bonds?

A. I didn't in this case what I do in all cases, sir, and that is to refuse to handle the bonds without a signed statement of the company that issues them.

Q. Well, now, do you depend on that alone?

A. No, I didn't in this case.

Q. What did you do in this case?

A. I inquired from several sources; the Washington Trust Company of Seattle, who was trustee of the Columbia River Orchard Company, prior to their organizing the company of Portland, and they told me that the interest on the previous issue of bonds was being paid in gold.

Q. Now, a trust company you know from experiences, usually certifies the bonds?

A. Yes.

Q. Did this Washington Trust Company certify to any of those bonds that you held?

A. No; they certified to the first issue of bonds that were eight per cent, and this company withdrew that issue and bought those bonds in order to put out smaller interest bearing bond of seven per cent.

(Testimony of H. P. Nolan.)

Q. Well, they didn't certify to any of the bonds you had, did they? That you handled?

A. No, no, sir.

Q. Well, you knew then that they had quit acting as trustee?

A. Oh, certainly; there was no question about that.

Q. Did you know why they ceased to act as trustee?

A. No sir; they made no statement as to why.

Q. Was the title then of this property that the Orchard Company claimed to own investigated by you, or anybody whom you represented, to see whether they owned it or not?

A. I didn't go that far. My attorney examined the papers, the incorporation. Mr. Cook examined the papers of incorporation, copies of which were submitted to him, and copies of which are in my possession.

Q. As a matter of fact, you learned afterwards, when the bottom fell out of this corporation, that they didn't own anything up there of any substantial value, except some equities in properties, and what interest they might have in the ditch and pumping plant?

A. Yes, I found out all that had been known, and I was subpoenaed before the Grand Jury here in Portland a year ago last February.

Q. You have found out, though this: That at the time these bonds were being handled there at par, as

(Testimony of H. P. Nolan.)

a matter of fact they were not worth anything like par?

A. Oh no; they were worth par, and were so accepted at par.

MR. WOOD: Immaterial, irrelevant and incompetent, what he found out after the date of the transaction.

A. Well, if I had known they were worth nothing I wouldn't have sold my property for them, sir.

Q. Hasn't it turned out - - -

MR. WOOD: I object.

Q. (Continuing) That they were not at that time—not the value you put on them or somebody else—but hasn't it turned out to your knowledge, that there wasn't sufficient securities behind the bonds even at that time?

COURT: Let him answer the question.

A. I investigated the bonds, as I thought, very thoroughly, and I was satisfied with what was purported to be behind the bonds, and I actually sold my property for the bonds.

Q. What I am getting at is whether you had any personal knowledge as to what titles they owned up there, that they represented they did own?

A. I have not, sir.

Q. What interest they had?

A. I have no personal knowledge, sir.

Q. You don't know anything about that?

A. No, sir.

(Testimony of H. P. Nolan.)

Q. But you know finally what became of the bonds, and how they terminated, as to the other people?

A. Well, I have got about \$20,000. of their securities in the safe deposit in Seattle now.

Q. Of their bonds?

A. Their bonds and their land contracts.

Q. You know what they are worth now, the bonds?

A. They are worth so little, sir, that I wouldn't offer them for sale nor sell them to anybody.

Q. Now, at the time you were negotiating the bonds, you real estate gentlemen down there in Seattle, it was all done in land values. You were not selling for cash, were you?

A. I never sold one for cash, sir. Just let me change that answer. I did sell two of *bonds lots* for cash. They were seven per cent bonds.

Q. Well, generally down there, from what you determined about them—you say they were worth par value, was where you were using for trade—trading one piece of property for another?

A. Yes, sir.

Q. They were not handled by the banks or anybody on the market for cash?

A. No.

Q. Not exchanged for cash?

A. No, the banks didn't handle them for cash.

Q. Now, the bonds that you got. Did you get them directly from the company itself?

A. No, I told you I got some from Mr. Howe, and

(Testimony of H. P. Nolan.)

I got them from several brokers. Why, I would call them up over the phone and tell them I was offered certain property at a certain price the same as I have called the Trustee Company or other concerns that have local offices there, and told them that I could trade certain property for their stocks or their bonds at a certain price; and the price was real estate, so and so. Do you want it?

Q. In doing that, you were acting then you say, as agent for the Columbia River Orchard Company. That is, you might say a self constituted agent. You would call them up?

A. You can put it so if you care to. I am a broker there and trade in bonds.

Q. What previous arrangements did you have with the Orchards Company to that? That you could handle their bonds, or how did you come to figure on that?

A. Each transacton would come on as a brokerage. Is that the point you want, sir?

Q. Yes, I want to know the relations between you and the company and how you came to handle the bonds, and the arrangement.

A. Just as open broker for a brokerage.

Q. That is, you were not a regular agent for them?

A. No, I don't know that they had any.

Q. Each broker in Seattle was doing as you did; that is, whenever they got a chance to exchange a



(Testimony of H. P. Nolan.)

piece of property for some bonds, they would call on the company for bonds?

A. I can't say that they did. I presume they did, sir. But that is what I did.

Q. And you got your regular commission for doing that from the company? Get any pay from them for handling the bonds?

A. On some of the deals I did get pay in bonds.

Q. What did you take it in money or bonds?

A. I have been paid some cash.

(Questions by Mr. WILLIAMS.)

What was the date of that 600 acre transaction?

A. February 17, 1911

Q. Now, you said that that was purchased to be used as security for the contract of the Pacific Power & Light Company?

A. Yes, sir.

Q. Do you know why they wouldn't accept that as security for the contract?

A. No, I don't. That was 500 acres of land that was clear of any incumbrance.

Q. Do you know that they didn't accept it as security?

A. Yes, I have heard that.

[Testimony of Everett Smith, for the  
Defendants.]

EVERETT SMITH, witness called on behalf of defendants first being duly sworn, testified as follows:

(Questions by Mr. ERSKINE WOOD.)

Resident of Seattle, lived there 28 years. I am one of the Superior Court Judges of Seattle, have been such fifteen months. I began the practice of law in Seattle in 1885—28 years ago.

Q. Do you know the defendants C. A. and E. C. Kilbourne.

A. Yes, sir. I have *know* Dr. Kilbourne, for 28 years, and known C. A. Kilbourne *comething* over 20 years.

Q. Are you familiar with their general reputation in Seattle? for integrity and business honesty?

A. Yes, sir.

Q. What is it?

A. Why, for integrity and truthfulness and fair dealing, they stand very high.

[Testimony of J. G. Blake, for the Defendants.]

J. G. BLAKE, witness called on behalf of the defendants, being first duly sworn, testified as follows:

(Questions by Mr. C. E. S. WOOD.)

Reside in Berkeley, California, have resided in Seattle, from the first of August, 1889 to the first of February 1907. I am general superintendent of the Pacific division of the Postal Telegraph system. For the first 13 years I was manager of the Seattle office and the last five years, superintendent of the second district of the Pacific division.

Q. Do you know the defendants in this case. Dr. E. C. Kilbourne and C. A. Kilbourne.

A. Yes, sir. I have known Dr. Kilbourne, since either August or September 1889, and the other Mr. Kilbourne, I think about '95.

Q. Do you know their general reputation in Seattle, for integrity and honesty.

A. Yes, sir.

Q. What is it, good or bad.

A. Very good.

[**Testimony of William McKenzie, for the  
Defendants.**]

WILLIAM McKENZIE, witness called on behalf of defendants, being first duly sworn, testified as follows:

(Questions by Mr. ERSKINE WOOD.)

Am in charge of the mortgage loan department Balfour Guthrie & Company. Must be 30 years that I have been in charge of that department. They are engaged in loaning money over the wheat sections of the northwest. Made a loan on what is known as the Tobey Brothers ranch to the Kilbournes, early in 1911. Got a report from our regular appraiser as to the value of the land for the purpose of the loan.

Counsel for plaintiffs objected to witness stating the value placed on the land by his appraiser.

Adjourned, until 10 o'clock A. M. tomorrow morning.

Monday, May 19, 1913, 10 A. M.

[Testimony of Charles A. Kilbourne, for the  
Defendants.]

CHARLES A. KILBOURNE, one of the defendants, being first duly sworn, testified in his own defense as follows:

(Questions by Mr. WOOD.)

Am one of the defendants in this case. Practically no relation at all to E. C. Kilbourne. If we go back far enough *er* can probably find the connection but it is several generations back.

I first met Dr. Kilbourne, when I came to Seattle in 1889, when I was a boy. I went to work for him originally, Have known him ever since and been associated with him in business ever since.

Kilbourne & Clark Company, is a corporation, which was organized in 1901 for the purpose of engaging in business *in* dealing in electrical machinery and electrical supplies building electric plants, pumping plants and kindred lines of business.

Have been in Seattle, nearly all the time since 1889. I think there were about eight stockholders all together (refering to Kilbourne & Clarke Company) at the time we entered into this Orchard Company contract for the pumping plant. The Kilbourne & Clark Company, were building quite a number of plants at the time, lots of them, all along the Columbia River, or in that neighborhood. One was the Longview Orchard Company, one was the



(Testimony of Charles A. Kilbourne.)

Cohasset Irrigation Company, Murdock & Phreny was another. Probably a half dozen more I could name.

I was president and treasurer of the company and had more particular charge of the accounting and financial end of the business. Dr. Kilbourne, was the general manager, having in charge the sales and operation end of the business.

Q. What did you personally have to do with the DeLarm Orchards contract.

A. Very little as a matter fact I was in New York City, at the time the contract was entered into, returned in January, about January 7th, when I was told that the Company had secured a contract with that concern, the Columbia River Orchards Company. I had nothing to do with drawing the contract. Mr. Simpson, our chief engineer, had that in charge, I think, and later on, Dr. Kilbourne, entered into it. He was away also.

Q. Did you have anything to do with the execution of this contract, other than furnishing the funds?

A. No, I think my first point of contact with DeLarm and the Columbia River Orchard Company, was to go to his office within a few weeks after the contract was signed for the purpose of ascertaining the financial standing of the company, whether we were justified in going ahead with the work; payments were to be made in such a way that

(Testimony of Charles A. Kilbourne.)

we couldn't apparently get in very deep anyhow, but as a matter of ordinary business precaution I went up there, I think, with Dr. Kilbourne at the time. Yes, I am sure he was with me.

Q. What did you ascertain?

A. Had some general talk with Mr. DeLarm in his private office. He explained about the plan and scope of his enterprise, and further, either that day or the next day, said—yes, the following day, said the statement was not ready—the next day a statement was shown to me purporting to represent the assets of the company at approximately \$960,000, and on the letter head—

MR. WOODCOCK: Is that in writing?

A. It was in writing. I had the statement. I am not able to find it at the present time. I hunted very carefully for it, before I came down here. I haven't seen it for a long time. I haven't seen that statement since—it is probably over two years, but my recollection is, it calls for assets of about \$960,000, and in the liability side, showed an authorized bond issue of \$300,000, and some small amount, much smaller amount, \$16,000, possibly, as I remember it now—I may be wrong as to the exact amount, though—due the state on purchase of school lands, and about \$3,000. in open accounts. Just current running accounts; so that it left \$600,000. as the approximate net assets of the company.

Q. Did you at any time, then or thereafter, see

(Testimony of Charles A. Kilbourne.)

any security or get any list of securities. Do you know anything personally about that?

A. Nothing whatever except that Dr. Kilbourne had—or said to me that he had a list of securities.

Q. Do you know anything yourself about this bond issue, or did you make any inquiries about it?

A. Absolutely nothing. The only thing I knew about it was what Mr. DeLarm told me. They had an authorized issue of \$300,000. and had at that time telegrams and letters which were apparently authentic, indicating that the issue was practically sold in Chicago.

Q. Did he show you those?

A. Yes, I read them myself, and was satisfied that if he hadn't the money then, he would have in a few days. And with that understanding, we authorized the going ahead with the contract.

Q. Now, when did payment stop on that contract, and when did you shut down on it? That is already in evidence. Just briefly state it.

A. Well, the payments really hardly started, you might say; we went ahead with the work anyhow, and had proceeded to a point where we had, perhaps \$10,000. in and considerable payment was due; \$5000. then and \$5,000. the following month as I recall it. Then the water in the river began to rise so rapidly that we discussed the matter, and concluded, after talking with Mr. DeLarm, and his making a showing that very soon he would have the

(Testimony of Charles A. Kilbourne.)

money anyway, we concluded for our own protection, the safest thing to do was to go ahead with the work, and protect it against the rising water, and in doing that we became involved to the extent of about \$43,000., or more, I guess it was at that time; perhaps ran up to \$47,000. leaving with the credits a net amount of forty two or forty three thousand dollars.

Q. Then you stopped and shut down?

A. We shut down the work then because it was safe to do so. Put a watchman in charge.

Q. After giving all credits for all sources, what balance was left due you after you shut down?

A. Well, at the moment of shutting down, I don't recall just what it was, but the books will show that the net amount due from the Columbia River Orchard Company to Kilbourne & Clarke Company was forty two thousand three hundred and some odd dollars.

Q. Have you the books here in court?

A. Part of the books; I think all that are essential. The ledger of Kilbourne & Clarke Company, which shows the balance due, and there is a statement there in it, I think.

Q. I don't care to go into it, but I offer the books to opposing counsel.

A. On page 131 you will find the balance. There is also a statement there of date February 28, 1911,

(Testimony of Charles A. Kilbourne.)

which practically corresponds with the face of the ledger.

Q. Had you personally made any advances to the Kilbourne & Clarke Company, to enable them to carry on this and other work?

A. Yes, I had.

Q. To what amount—what extent?

A. At the time the Kilbourne & Clarke Company went out of business the first of 1911, the balance due me, as shown by the ledger and the statement, was \$73,000. and a little over.

Q. Why did the Kilbourne & Clarke Company go out of business?

A. Well, for the last two or three years they had been engaged principally in constructing irrigation and pumping plants not the ditch plant, merely the machinery part of it, and the market for irrigation securities was apparently so bad, had become so bad, that most of the companies for whom we were doing work were in financial straits. They couldn't sell their securities, and they couldn't pay us, and we could no longer continue in business, and I was not able to put up any more money, and didn't feel inclined to do so anyhow, so when this Columbia River Orchard job got in bad shape, we decided the best thing to do was to go out of business entirely, and merely to finish up the work we had on hand.

Q. Did you do that?

A. We finished up the work, and paid every dol-



(Testimony of Charles A. Kilbourne.)

lar the Kilbourne Clarke Company owed, with the exception of the balance due the Puget Sound Bridge & Dredging Company, and for which we furnished adequate security.

Q. What do you know about this Tobey ranch? About Dr. Kilbourne's investigation of it and experting of it, and finally about the acquisition of it?

A. My first point of contact with that was when Dr. Kilbourne came into my office and said that DeLarm had just left him, and told him that he had another irrigation scheme down in Oregon, and wanted him to go down and look at it.

Q. Let me interrupt you. Can you give approximately the date of that?

A. Well, I didn't look it up or try to fasten it definitely, but it was in the early part, or middle, perhaps of February, 1911. I asked him what DeLarm wanted with another scheme when he hadn't got through with this one. Dr. Kilbourne said that DeLarm wanted him to go down and examine the property. Well, Dr. Kilbourne, went to Oregon with Mr. DeLarm to look at the property, and returned to Seattle, and made a report to me on it. That he had examined the property and agreed that it was a feasible irrigation proposition if it were properly handled, and that he understood that Mr DeLarm, had a contract on the land. Some days went by, and Dr. Kilbourne came to me again, and we talked over the matter. He said that Mr. DeLarm, had

(Testimony of Charles A. Kilbourne.)

offered him this land, offered to have this land *deed* to him as security for our claim.

Q. Well, what did you say?

A. Well, I didn't like the proposition very well, but after talking it over, we decided it was perhaps the best thing to do because it would enable Columbia River Orchards Company to go ahead with their proposition, and perhaps we could work out our own affairs just as well by holding the land as security. So it was decided that Dr. Kilbourne should take a deed to it. He then went to Portland, on the 14th day of March, and returned a day or two later, stating that the land had been *deed* to him but that he hadn't received the deeds yet, but that he had been to Balfour Guthrie, and made arrangements for a loan there and authorized the delivery of the deeds to Balfour Guthrie. A few days subsequent to that, DeLarm came to Dr. Kilbourne's office, and they sent for me, and we had a discussion as to the affairs—condition of our account, and as to how it should be settled. And at that time we made a definite arrangement that the Kilbourne & Clarke Company should take over the land in payment of this account, providing DeLarm would do certain other things which he agreed to do. It was agreed that we should accept the land in payment of our claim; that we were to finish the second unit, which was estimated to cost about—I should say, we were to finish the plant, which was estimated to cost

(Testimony of Charles A. Kilbourne.)

about seventeen—sixteen or seventeen thousand dollars. Then we were, upon a certain given notice, to construct the second unit of the pumping plant, estimated to cost about \$10,000. DeLarm on his part, for his company, was to furnish \$7500. to be paid to the Puget Sound Bridge & Dredging Company, who had agreed to release its lien of \$22,000. upon payment of that \$7500. and hold other securities for the balance, and in addition to that \$7500. the DeLarm Company was to assume and pay off a claim of the Moran Company in Seattle, amounting at that time to about \$2200. These matters were all agreed to between us and settled subsequently upon that basis. After DeLarm had gone, I talked the matter over with Dr. Kilbourne, and decided that I would take for my claim against the Kilbourne & Clarke Company—c—

Q. That is for those advances?

A. For the advances which I had made personally; I would take the land for my claim, and would credit the Kilbourne & Clarke Company on the account whatever they had put into it, whatever it had cost them, plus their profits, so the Kilbourne & Clarke Company would receive the entire benefit to that point.

Q. You don't pretend in this case that you took this title from Dr. E. C. Kilbourne except as he took it; that you were interested in it from the start, and you knew what he knew about it?

(Testimony of Charles A. Kilbourne.)

A. Oh, certainly I did. I will say this also; That it was agreed in my finally taking over the land, that Dr. Kilbourne was to have a certain interest in it, in proportion to the amount of money which he himself had coming.

Q. Who was to finish up the job—the Kilbourne & Clarke Company, or you two men?

A. E. C. and C. A. Kilbourne were to finish the work.

Q. You said, If I recollect rightly, that the Kilbourne & Clarke Company was to take the land.

A. They were to take the land. Originally the land was placed in Dr. Kilbourne's name as security for the Kilbourne & Clarke Company—that was pending adjustment as to how it would be taken over. It wasn't known definitely at that time we would take the land at all. That was arranged a few days later between DeLarm and myself.

Q. But Kilbourne & Clarke Company did not take the land?

A. Not as a company, no.

Q. You and Dr. Kilbourne took it?

A. Yes.

Q. Why was that?

A. I don't quite understand. Of course the title was taken in Dr. Kilbourne's name to cover the claim of the Kilbourne & Clarke Company for the work performed.

Q. I know that, but I am trying to distinguish

(Testimony of Charles A. Kilbourne.)

now between Kilbourne & Clarke Company, and you and the Doctor. You said that Kilbourne & Clarke Company was to take the land as a corporation?

A. Yes, sir.

Q. But they didn't do it?

A. Oh, it was never taken in the name of the corporation, no.

Q. Why not?

A. It was much more convenient to take it in the name of Dr. Kilbourne, and because—well, just a logical way to handle it, anyhow.

Q. And you and Dr. Kilbourne—what I am trying to get at—satisfied the creditors of the Kilbourne & Clarke Company?

A. Oh, absolutely. Paid every claim of every kind, nature and description. I would do that anyhow, if my name was connected with a company. I wouldn't allow anything open.

Q. Now, what did you have to do with this loan, the Balfour Guthrie loan, personally?

A. I had nothing to do with the loan until after I took title to the property. I went to Portland on the night of the 27th day of March. On the 28th day of March, I think it was, I received the deed; I received the deed on the 28th day I think it was. I made an application for a loan to Balfour Guthrie, for \$20,000.

Q. Was that your application?

A. Yes, sir.



(Testimony of Charles A. Kilbourne.)

Q. I thought you asked for more?

A. No, I signed an application for \$20,000 because I couldn't get any more on the loan. They would only appraise at \$52,000., and that is all they would advance.

Q. What did you do with that money?

A. We used the money in the construction of the balance of the plant.

Q. You put it all—

A. Mostly.

Q. How much of it.

A. \$17,000. and over.

Q. Have you a statement of that \$17,000 itemized?

A. Yes, I prepared such a statement.

Q. Together with the checks and vouchers?

A. Yes, sir.

MR. WOOD: I offer the itemized statement taken from the books of the company, with the vouchers.

MR. WOODCOCK: Do they come from these books, this statement? Where are the books?

A. The payments were not made by the Kilbourne & Clarke Company mainly. Of course, they were made by E. C. Kilbourne, and by an account which we carried as the Kilbourne Company, and by E. C. Kilbourne, personally, many of them.

MR. WOODCOCK: Where are the books?

MR. WOOD: Those are the original pay checks. I don't see what you want better than that.

(Testimony of Charles A. Kilbourne.)

Q. What books of account are these from?

A. I will state that these payments were made through various accounts. Might have been part of them paid by the Kilbourne Company, which was the name we carried on the partnership at the ranch.

Q. Not the Kilbourne Clarke?

A. No, the Kilbourne Company. That was a partnership composed of Dr. Kilbourne and myself; and an account as the E. C. Kilbourne and C. A. Kilbourne. Many of the accounts were paid through a checking account with the Dexter Horton Bank, and quite a number paid by my own personal check. The checks themselves will show.

MR. WOODCOCK: Did you keep a book account?

A. No, the book itself.

MR. WOODCOCK: What I mean, did you keep a book account showing the expenditure of that \$17,000., showing how it was expended, and to whom it was expended?

A. Yes, that is all shown by these different books.

MR. WOODCOCK: I ask if you kept a book of it?

A. Not in one single book. No, sir, wouldn't find it that way.

MR. WOODCOCK: Didn't keep a separate book?

A. Didn't keep a separate book, no. Just passed through the ordinary account in which we were doing business at this time.

(Testimony of Charles A. Kilbourne.)

MR. WOODCOCK: I don't think that statement would be competent.

MR. ERSKINE WOOD: The statement isn't offered in evidence. It is offered to you for your information.

MR. C. E. S. WOOD: All right. You can have those books.

A. I will say these cash books are our own private books, containing all our records of every kind, including my personal affairs. You can have them, however, if you want them.

MR. WOOD: I would rather in a case of this kind, let them have anything they want.

MR. BRYSON: We would like to have the book account from which the statements are made up.

MR. WOOD: All right, you can have them. We will give you the books.

Q. Where are the books?

A. I think you will find them in the case, Doctor.

Q. Have you them, Doctor? (To Dr. Kilbourne)

WITNESS: That is the Kilbourne Company, the other case. (To Dr. Kilbourne.) (Books produced.)

Q. Just find the one that the statement is taken from, the different ones. You say this statement, copy of which was furnished to counsel, was made up from the various sets of books.

A. Made up from the cash books.

Q. One was the cash book of yourself personally?

(Testimony of Charles A. Kilbourne.)

A. Yes, sir.

Q. One was the cash book of yourself and the doctor, acting under the name of the Kilbourne Company?

A. Yes, sir.

Q. And what was the other?

A. The other is the firm of E. C. and C. A. Kilbourne.

Q. The cash book of E. C. and C. A. Kilbourne?

A. Yes, sir; most of the records in that latter book are connected with the office building which we operated in Seattle.

Q. Which one of these books would have most of the items in, as far as you know?

A. I think the largest account would be in my personal book and the greatest number of items would appear in the Kilbourne Company book.

Q. I show you cash book, and ask you whether that is the cash book of the Kilbourne Company?

A. Yes, it is.

MR. WOOD: I don't want to offer these in evidence and leave them here, but I offer them to counsel for examination.

MR. BRYSON: You have no ledger account?

MR. WOODCOCK: We don't know how to examine them. It would take a book expert to do that.

Q. What have you in the way of ledger index to these books?

A. We didn't keep a regular ledger account for the finishing of this contract, for the reason that it wasn't necessary for us to account to anybody for

(Testimony of Charles A. Kilbourne.)

any exact items We were to finish the plant, and the cash books are a great deal better evidence than the ledger would be, for they are the books of original entry.

Q. I will show you a book, and ask you if that is the cash book of E. C. and C. A. Kilbourne?

A. E. C. and C. A. Kilbourne.

MR. WOOD: I offer that. I offer that to counsel for examination.

Q. Is this your own personal cash book, practically?

A. Yes, sir; Charles A. Kilbourne private cash book.

MR. WOOD: I offer that to counsel.

Q. Now, have you produced here in connection with this account, the vouchers and checks which make up the items of the account?

A. Yes, sir; most of them are there. There may be two or three missing. In a hurried search I wasn't able to find all of them quite.

Which counsel have in their hands?

A. Yes, sir.

MR. WOOD: I offer this statement for the convenience of the Court, together with the original vouchers which verify it

Statement marked "Defendants' Exhibit T."

Vouchers marked "Defendants' Exhibit U."

A. I will say since that statement was made up, in searching for these vouchers, I found some ad-



(Testimony of Charles A. Kilbourne.)

ditional items, amounting to perhaps \$1,000., but I didn't change it, of course.

Q. That would swell the statement?

A. That would swell the amount, yes. It goes more than that estimate, but - - -

Q. Then, what did you have to do with this Wakefield loan, and personally state what you know about it. Under the Clapp mortgage. State what you personally had to do with it.

A. I think it was in September, or October, of the year 1911, about the 27th or just prior to that, DeLarm came to our office—came to my office with Dr. Kilbourne. Our offices were not at that time together, although in the same building, and stated that he would be able to negotiate a second loan on the ranch if we would be willing to give it, of which he would take \$10,000., and release us from the liability to construct the second unit, of the plant. The entire loan to be for \$17,500. and inasmuch as he had not been able to raise the \$7,500. to pay the Puget Sound Bridge & Dredging Company, there would be \$7500. available out of the mortgage to apply in that direction; and that if we would turn that over and get the lien released, that he would then pay it back from other sources.

Q. This was to attempt to carry out his agreement to pay that \$7500?

A. To pay them the \$7500.

Q. What was done in that connection?

(Testimony of Charles A. Kilbourne.)

A. The same day, I think, in the afternoon, Mr. Wakefield, J. Alexander Wakefield, an attorney in Seattle, with offices in the Alaska Building, was brought into my office with DeLarm and said that he represented Cyrus P. Clapp, and H. E. Lutz; that he was making loans for them, and that this particular loan of \$17,500. he was making on their behalf, and that he would make such a loan, if, upon investigation the land and title, etc., was satisfactory. Abstracts were furnished, and in due course of time, two or three days, he brought into the office a deed and some notes, I should say a mortgage and some notes, and a chattel mortgage which I refused to sign; told him that we wouldn't under any circumstances execute a chattel mortgage because it would affect my credit in the community in which the ranch was situated; so we dismissed the matter, but they came back a little later with a proposition that they would leave out the chattel mortgage and make a straight mortgage. I think, however, there was a little point in it that we considered it to be a chattel mortgage, but it wasn't itemized in that way anyhow. The result was, I finally executed the mortgage, and Mr. Wakefield said to me, "Now in all the loans that Mr. Clapp makes, it is his custom to see first that there has been nothing placed on the record after the examination of the abstract and before the mortgage is recorded, recording the mortgage first before advancing the money. I knew that

(Testimony of Charles A. Kilbourne.)

we had the same method of procedure in the case of the Balfour Guthrie mortgage to go through, and so I turned the mortgage and the notes over to him, and he said that Mr. Lutz would take them, and at the same time he showed me an execution of an assignment to Lutz, to Clapp and Lutz, of the mortgage and he said that Mr. Lutz, would take them all, was going down to Gilliam County, Condon; as soon as they were on record, that the money would then be paid over. I will correct that, I am not sure that he said Mr. Lutz, would go. I know he did go, as a matter of fact. He said somebody would take them down. He said would be a matter of several days, perhaps a week, before he would be able to turn over the money. I said to him "as soon as they are on record, and you get back here, you are authorized to turn over to DeLarm \$10,000 for his share in the transaction, and the \$7500. you are to bring up to me, and we will go up then to the Puget Sound Bridge & Dredging Company, and secure a release of the lien.

Q. Lien on what?

A. Lien on the pumping plant of the Columbia River Orchards Company.

Q. Which you had built?

A. Which we had built. A week went by, and I rang up Wakefield's office, and asked if he had heard anything from that mortgage yet, and he said yes, they had just got word it was on record, and in a day or two the money would be paid over. I went

(Testimony of Charles A. Kilbourne.)

out of town for a few days, and when I returned, I found a surprise. The money hadn't been paid over to Dr. Kilbourne in the meantime, and I rang up again. He said, "Well, just a few days, Mr. Clapp is away. Will be away over Sunday. In a day or two more will have the money for you." I said, "I wish you would attend to this right away. It has already gone too long." Well, I went to the office of Wakefield, and then he told me for the first time that Mr. Clapp and Lutz had some kind of an arrangement on, by which they were examining the Northern Pacific lands, and they expected to furnish the money to finance the balance of the proposition, and they wished to have the whole matter go through together, and he would like, as a matter of accommodation, to wait two or three days more, and it looked reasonable enough, so I let it go, and many times after that we tried to get the money, and on one excuse or another, sickness or out of the city, he put it off, and the money was never paid.

Q. Has it ever been paid?

A. Never has been paid.

Q. What efforts did you make, when you discovered his duplicity to collect the money?

A. We took it up with the firm of McClure & McClure in Seattle, and urged them to take whatever action was necessary to collect the money.

Q. Mr. Kilbourne did you or your company, directly or indirectly have any connection with De-



(Testimony of Charles A. Kilbourne.)

Larm and his projects, other than your corporation was to build this pumping plant?

A. Never in any way, shape or manner. We knew nothing whatever of his inside affairs.

Q. Did you ever have any of these bonds offered to you in payment?

A. Never presumed to offer us any bonds at all. He knew that we were not able to carry bonds, couldn't take our pay in that way, and he never offered them.

Q. Did you know anything about the bonds, or the value of them, and if you knew anything state what it was, and what your own belief was.

A. I knew nothing about the value of the bonds. I knew they had a good proposition, and supposed there was \$300,000. authorized, and that the property ought to be perfectly good for that issue.

Q. I will ask whether you have made a statement from the books, showing the cost of operation and receipts from the ranch, and whether this paper I show you is it?

A. This is a complete statement of the earnings and expenses of operating the ranch for the two years ending March 1, 1913. That is the date on which we took it over. That is, it was about as of that date we took it over. As a matter of fact, it was later in March.

Q. What does it show for the first year?

COURT: Net result.



(Testimony of Charles A. Kilbourne.)

Q. Yes, just the final result.

A. Shows expense of operation, \$12,625.82, and total receipts, \$3,516.84. In other words, a net loss for that year of \$9,108.98.

Q. And the next year?

A. The next year the net gain was \$9190.01.

Q. Making for the two years what net result?

A. Net profit for the two years of \$81.03. On an investment of about \$75,000. I will state, however that net profit doesn't take into consideration amount paid for interest or miscellaneous expenses, but just items which are directly chargeable to operations.

MR. WOOD: I offer the statement in evidence, and offer the books for examination.

MR. WOODCOCK: Was that the three years? He hasn't read the third year.

MR. WOOD: He hasn't had it three years. The next crop will be the third crop.

Marked "Defendants' Exhibit V."

A. The statement also shows the addition to the equipment of the ranch, amounting to \$13,000.

Q. Who advanced that money?

A. I did.

Q. Personally?

A. Most of it, yes, sir. About \$11,000 of it I advanced personally. The rest we borrowed. It also shows the cost of operation per acre and per bushel.

Q. It is a complete statement?

(Testimony of Charles A. Kilbourne.)

A. It is a complete, accurate statement as far as it goes.

Q. Showing the cost of raising wheat per bushel, and the cost of operation per acre?

A. Yes, sir.

Q. And in figuring the profits and expenses, did you include this \$13,000. for added equipment?

A. Oh, no, no nothing of that kind.

Q. That is not deducted from gross receipts?

A. No.

Q. But you wrote that in as a part of your general investment?

A. That is the idea.

Q. Have you bought any other land up there since you have been there?

A. Yes, sir.

Q. What land?

A. Bought 1440 acres.

Q. From whom?

A. The man adjoining on the west, nearer the town of Olex and the railroad, from the Tobey ranch Tobey Brothers' original ranch.

Q. Nearer the railroad.

A. Nearer the railroad.

Q. From whom?

A. From T. B. Garrison.

Q. What did you pay for that?

A. Bought at the rate of \$10.87 per acre.

Q. On what terms?

(Testimony of Charles A. Kilbourne.)

A. \$2500. cash, and the balance spread over some time. I think the last of it takes out this fall.

Q. Do you know what he paid for it?

A. \$10. per acre, he told me.

Q. What in?

A. Trade. Traded other land on that basis.

Q. Have you had other lands offered you up there as low as \$10. an acre or thereabouts?

A. No sir; the lowest price that I recall now has been \$12.50 an acre.

Q. How do they compare, in situation and character of soil, with the Tobey land?

A. Oh, substantially the same. This land that I speak of, the corner lies just the other side of the fence from the Tobey Brothers' original ranch. I will state that a great deal of the land was offered to us up there, but we didn't consider it because we didn't want it. You asked what other lands I bought. There was another piece that I bought, or Dr. Kilbourne and I bought from DeLarm, adjoining on the east end.

Q. Is that the Glover piece?

A. That is known as the Glover piece, had 840 acres.

Q. Traded a lot of machinery?

A. Paid some cash, assumed a mortgage and paid the balance in machinery.

Q. And released DeLarm from the obligation he was to pay?

(Testimony of Charles A. Kilbourne.)

A. Yes, I had loaned DeLarm \$2950 and that applied as a cash payment.

Q. I will ask you if you remember being offered land by a man by the name of Knott?

A. I remember being in Olex, and meeting a man by that name, who said that he had some land up there, and he asked me—I was with Dr. Kilbourne at the time, and asked me if I didn't want to buy it, and I inquired the price. At that time he asked \$15. an acre for it. I didn't want it, and told him so; not then but later.

Q. I will show you Plaintiffs' Exhibit 140 and 141, 140 being a letter from E. C. Kilbourne, dated June 8, 1911, and all that I care for you to testify about, or call your attention to, is this allusion to Knott. Just read that over, and state what connection you had with it, and state what your recollection is. Witness read letter Plaintiffs' Exhibit 140, and counsel continued his question. Now, I show you an unsigned carbon copy, marked "Plaintiffs' Exhibit 142," for *indeitification*," which they weren't able to get into evidence when they examined Dr. Kilbourne, and I will ask you to examine that, and state whether you can remember writing such a letter.

A. I have already examined this copy.

Q. Well, then, just state - - -

A. And unless I were to see the signed original, I would say that I had never written or signed such a letter, but it is barely possible, because I recall that

(Testimony of Charles A. Kilbourne.)

in passing through Portland with my sister, on my way to California in the early part of June, that the Tobey title had not been straightened out entirely, and I couldn't get all my money from Balfour Guthrie, and we stopped over between trains, and both of us called at Mr Hodges' office and I asked *hi* if he would follow up the matter while I was gone, and urge the Tobey's to straighten out that title. And while I was there, a few minutes in his office, he called attention to a man by the name of Nott in Olex, with whom he was negotiating a trade. Nott had said to him he was going to sell his land to Kilbourne for cash. Mr. Hodges asked me if I intended to buy it. I said, "No, I didn't want the land. Now, whether he asked me to write to him we didn't care to buy the land, so that he himself, Hodges, might go on (drawing or dictating the letter himself) I don't know. I have no recollection of dictating this particular letter. It isn't my style of composition, at all, but it is possible I may have signed it. He may have dictated the letter, and asked me to sign it, but I think, however, that he probably wrote the letter and signed it and sent a copy to Seattle, as I naturally would ask him to do. I had no interest in the matter whatever, as I didn't care to buy the land and never did buy it.

MR. WOODCOCK: With the witness' statement, your Honor, we offer that letter.

MR. WOOD: I have no objection with this ex-



(Testimony of Charles A. Kilbourne.)

planation, for what it may be worth. Of course, technically, it is incompetent.

Marked "Plaintiffs' Exhibit 142."

MR. WOOD: I don't want you to complaint you haven't had the doors wide open.

MR. WOODCOCK: We are not arguing this case yet.

MR. ERSKINE WOOD: May I ask a question? Mr. W. L. Tobey, testified, Mr. Kilbourne, that you were here when the deed was delivered. It is possible he may have misunderstood the question gotten E. C. and C. A. mixed up, but that is what his testimony is. I just want to you to state whether that is true or not.

A. No, I was not there. I never met Mr. Tobey until the 28th day of March. That was the day on which I made application for the mortgage at Balfour Guthrie's a the day on which I signed it. The application was dated back, however, about the 15th or 16th; the only time I ever met him until in this courtroom.

#### Cross Examination.

(Questions by Mr. WILLIAMS.)

The Kilbourne Clark Company went out of business, you may say the first of January, 1911? They ceased to be active in business. Of course, had their affairs to close up, and was still engaged in that business, closing up.

Q. What affairs did they have to close up?

(Testimony of Charles A. Kilbourne.)

A. Collection of accounts, finishing up some work which they had on hand.

Q. What work was that?

A. Well, I don't know, that I can remember what accounts—what contract they were still working on.

Q. Did the Kilbourne & Clark Company do any kind of merchandising business?

A. Kilbourne & Clark Company?

Q. Yes.

A. Yes, sir.

Q. What?

A. They had been wholesale merchants in electrical supplies and allied lines, until about 1909, I think. They sold their business then to the Holborn Electric Company.

Q. They were out of that business when they went out?

A. No, they were not out of the merchandising business. They remained as machinery merchants, but sold their general supplies.

Q. Did they have any stock on hand January 1, 1911?

A. I think that is the date on which they finally turned over most of the lines of their machinery business to George—some firm up there.

Q. After January 1, 1911, they didn't do any of that kind of business?

A. They still had on hand some small quantity of machinery stock.

(Testimony of Charles A. Kilbourne.)

Q. When, did they dispose of that?

A. They may have some of that on hand; most of it, however, has been disposed of gradually. The part that was not taken over by their successors in that particular department. It was the intention, however, to retire actively from the business in January 1911.

Q. You say the reason they went out of business was because the market for irrigation securities was poor?

A. No, I think I didn't say that.

Q. What did you say?

A. I said the market had been poor, and the business was unsatisfactory. That was the purport of it.

Q. Did you have any irrigation schemes on hand beside the Columbia River Orchard Company, in 1911?

MR. WOOD: They didn't have any irrigation schemes on at all.

Q. 1910?

A. 1910, we didn't.

MR. WOOD: You didn't have any irrigation schemes on hand.

A. No irrigation schemes, I mean the construction of the plant, if that is what you refer to, engineering work.

MR. WOOD: These questions go in the record and the Court will, interpret the questions.

MR. WILLIAMS: I didn't intend to convey, Col-

(Testimony of Charles A. Kilbourne.)

onel, that he was interested in irrigation plants themselves.

Q. And it was on account of securities being poor in that year that you went out of business in 1910, or the first of 1911?

A. That was one of the contributing influences in going out of business; it was no longer satisfactory work.

Q. No longer profitable?

A. No longer profitable.

Q. You say you returned from New York, January 7, 1910?

A. My remembrance is that is the date. It was early part of January; I think the 7th.

Q. The contract wasn't signed until the 18th, was it?

A. I couldn't say. Probably signed by the Vice-president.

Q. Now, you say that Mr. DeLarm furnished you with a statement which showed a balance of \$600,000. of assets to the Columbia River Orchards Company. What did those assets consist of?

A. I don't remember exactly but they were listed in that statement, mostly as lands, and I think he had some sub-division of it as the kind of lands but I couldn't state positively, and perhaps he had some water mortgages in it also.

Q. Didn't the capital stock of the corporation enter into the securities largely, to make up them?

(Testimony of Charles A. Kilbourne.)

A. No, not in my mind at all. I wouldn't consider that as meaning anything unless it represented money.

Q. They had the amount of capital stock shown upon the statement, didn't they?

A. It may have been that. I couldn't tell you at this time, after two years. I *rembmer* the main features in the matter.

(Questions by Mr. WOODCOCK.)

What investigations did you make Mr. Kilbourne, about the standing of the company?

A. At the time of entering into the contract?

Q. Yes.

A. Nothing more than to call at the office of the company, as I have already stated, and secure what information they gave me there and we followed that up by going to the financial agents through whom the bonds were to be marketed in Chicago, and he practically verified what DeLarm had already said, and showed by his letters and telegrams, that the bonds were substantially as good as sold.

Q. Well, now, you were—under your contract, you were being involved to the extent of about \$43,000. That is, the original?

A. That is what it finally reached, yes.

Q. Well, you had some idea about that at the time you entered into the arrangement to do this work up there at Wahluke, didn't you?

A. Yes, sir; the idea in my mind was that we



(Testimony of Charles A. Kilbourne.)

would never at any time become involved more *than* the amount which would accrue in one month's operations. They were to pay, I think, about \$3,000; the first month, or, at the rate of \$5,000. a month, but I didn't consider that feature of the water coming up and forcing us to do more work than would normally be necessary.

Q. You are a practical engineer yourself?

A. No, sir, I am not an engineer.

Q. Well, you depended then on your engineer's statement as to what would be the *total* cost of the work?

A. Certainly *absolutely*.

Q. And you knew, to a large extent, at least, when you entered into the work about what the total cost would be, provided they made their payments as you say, along by the month or otherwise?

A. I know what the contract called for, yes, sir.

Q. Running up to something like \$40,000?

A. Yes, sir.

Q. Now you didn't make any investigation yourself, nor neither did your company, as I understand it, to ascertain whether this statement that had been put out by these people was true or not?

A. Yes, we made that investigation that I speak of, by taking the precaution of going to the firm of A. L. Funk & Company, who were acting as financial representatives of the Chicago concern.

(Testimony of Charles A. Kilbourne.)

Q. Did you investigate to find out whether they owned this land they claimed to own?

A. No, we didn't do that. We took their word for that absolutely.

Q. Now, with your experience in business, you *had have had* some experience in handling bonds?

A. No, sir. I have had no experience handling bonds. I never owned a bond in my life.

Q. You know what a bond means?

A. I certainly do, yes, sir.

Q. Now, you know where a company in your experience in business—where they send out bonds, based on real estate, where any disaster would change the status of it, and depending altogether on whether they owned the real estate or not, don't you think it would be important to examine the title to find out whether they did own the real estate or not?

A. You mean if I were going to buy the bonds?

Q. If you were dealing with institutions claiming to own property, contracting with you, where they claimed their resources consisted of real estate, as a business man, don't you think it would be your duty to investigate?

A. It might be. It would vary under different circumstances according to the degree of confidence I had in them, and I certainly had a good deal in Mr. DeLarm at that time. He impressed me very favorably in deed.

Q. After you had drifted along and done the work

(Testimony of Charles A. Kilbourne.)

awhile there, you found out they couldn't pay, didn't you?

A. Found out they didn't pay.

Q. Well, they didn't pay, and you couldn't make them pay, did you?

A. No.

Q. You found out they couldn't pay?

A. They showed at the time a very plausible reason for not paying then, but made assurances which seemed to be all right, that they would be able to pay in a very short time, a few weeks.

Q. Now, prior to the time that this Tobey deal came along, they had been selling these bonds, trading them as the evidence shows here in this case, and you heard it, and you probably knew of your own knowledge they had been trading bonds already for property there in Seattle, hadn't they?

MR. WOOD: Objected to as not proper cross examination.

MR. WOODCOCK: On what ground?

MR. WOOD: Because I didn't ask this witness anything about bonds, bond values; didn't go into that subject at all. He said he knew nothing whatever about their bonds; were never offered to his company. You can test the truth of that, but you can't come and ask him about the Seattle bond market.

MR. WOODCOCK: I think he can go into the

(Testimony of Charles A. Kilbourne.)

whole subject. He claims to be an innocent purchaser in this case.

COURT: What he knew about the bonds at that time.

MR. WOOD: I understand that question is not to that effect.

Q. (Read.)

Q. And did you know about that?

A. Well, as a matter of fact, I knew almost absolutely nothing to that effect. I knew they had been trying to sell their bonds, of course, and I knew that if they could sell enough bonds to pay for their plant, that they would then be in very excellent shape, as far as I knew.

Q. You knew, then, Mr. Kilbourne, that they had their bonds on the market?

A. I knew at all times they were endeavoring to raise money, and supposed naturally *thorough* sale of their bonds. That was the ordinary method of financing irrigation companies.

Q. And then you knew further that as far as your company was concerned, you and Dr. Kilbourne and your company, all of you, there, that were trying to do this work, and already had done some of it, that they were not realizing any money to pay you with?

A. We knew that we were not being paid.

Q. Did you know how they could get money outside of the bonds themselves?

(Testimony of Charles A. Kilbourne.)

A. No, I didn't know how they could get it outside of the bonds.

Q. Didn't you know, as a business man, that in dealings with them, they would have to depend on the sale of the bonds for the purpose of paying you?

A. They told me when they started in that is the way they expected to raise their money by the sale of bonds.

Q. They told you about their proposition to sell the bonds in Chicago?

A. Yes, sir.

Q. You knew that fell down? They didn't get the money?

A. I knew they hadn't received the money, or they probably would have paid us.

Q. Didn't you know *them* Mr. Kilbourne, up to the time that the thing collapsed, that is, during the pendency of it, the latter part of it, that they were unable to negotiate their bonds for money, either there in Seattle, or anywhere else?

A. No, I didn't know they were not able to. I knew they hadn't sold any so far for cash; that is, that I knew of; They may have sold some, but I mean to say, it hadn't been reported to me, and they still owed us money.

Q. Anyhow, you knew this thing; In order to get money, they would have to do it *thorough* the bonds—what they told you before?

A. Yes, sir.



(Testimony of Charles A. Kilbourne.)

Q. You depended on that. You depended on their statement about that, knowing from their statement that was the only method they had, as far as you knew of getting money?

A. I expected them to realize from the sale of their bonds, and pay us.

Q. Did you know of any other way they had to get money?

A. No, I didn't know of any other way.

Q. You relied upon their sale of bonds to get money to pay you?

A. I certainly figured that is the way they would get it.

Q. Now, up to the time the Tobey deal was made, you knew then that they couldn't get money through the bonds? That is, they hadn't got money?

A. I will have to say I didn't know that. I understood they had made some sales or trades in some way, so they had disposed of some of their bonds, how many I don't know. I have never been told. Just a *mer* matter of hearsay.

Q. Isn't it a fact Mr. Kilbourne, that about the time of the Tobey deal, which was made in the fore part of 1911, your company was practically swamped, as well as the DeLarm outfit?

A. No, my company was not swamped.

Q. Well, you were going out of business?

A. We were going out of business, by my com-

(Testimony of Charles A. Kilbourne.)

pany was perfectly good; not a dollar owed that wouldn't be paid.

Q. But you had concluded to go out of business because you had done business for a lot of concerns there, a lot of your business, including the DeLarm outfit, where you couldn't realize money, and you concluded it wouldn't be profitable to continue your business any further?

A. Yes. I stated that was one of the contributing causes of our going out of business; it wasn't profitable.

Q. Well, wasn't that the main cause?

A. Was one of the main causes; that and the fact that I didn't care to give my personal attention to it; had other matters.

Q. Well, Dr. Kilbourne, your partner—you heard his testimony about that? That was about as I remember his conclusion. Like any other business man would do, when you are doing business and can't make a profit out of it, can't secure the debts that are coming to you, you concluded to quit. As a business proposition, you didn't think it would pay you to go any further.

A. That is substantially correct, yes.

Q. Now, then, about the time the Tobey deal was made, that was about the condition of affairs?

A. That we were going out of business, you mean?

Q. Yes.

A. Yes, we were going out of business at that time.

(Testimony of Charles A. Kilbourne.)

Q. Now, when that deal was made, this company, the DeLarm outfit, we will call it for convenience---we all know what that means without naming these various groups---were owing you about \$43,000?

A. Yes.

Q. And up to that time, they hadn't shown any signs of life in the way of producing the money?

A. They had shown considerable signs of life, but hadn't produced the money.

Q. That is what I mean; and they had agreed to pay you by the month, and they had defaulted on that, and wasn't it known, and didn't you understand at that time, and didn't you feel that way, that they were practically broke?

A. No, I didn't figure they were broke. I thought they had the basis of a fine proposition there, and it was only a matter of being able to dispose of their securities when they would pay us, and go along splendidly.

Q. Now, you understood this much anyhow. They couldn't raise the money?

A. They hadn't raised it. That was not a good sign they couldn't raise it.

Q. They hadn't paid you?

A. They hadn't paid us, no.

Q. Now, when it came down to the Tobey deal, taking this land over, this farm, you started in there through Dr. Kilbourne. He was the first one that informed you about that?

(Testimony of Charles A. Kilbourne.)

A. Yes, sir.

Q. And you concluded that as far as you personally were concerned—in the first place, you concluded to take it to secure your company. That was the first idea, as I understand it. Now, let me state it, and see if I get your idea correctly. As I understand you, the DeLarm people were owing you this sum of money, and when you first figured on the Tobey ranch, you concluded to take it over, hesitatingly as you said for the purpose of securing you in the payment of what the DeLarm outfit owed you; that his companies that had been dealing with you, and whereby you were caused to do this work—you understand what I mean.

A. Yes, I see what you mean.

Q. I ask you whether you understand?

A. Yes, I say I understand. That is substantially the fact.

Q. That was the first idea then, to take it over for security. That is, you wanted to be protected the best way you could, like any business man would; to be protected the best way you could in what was coming to you—you might say from the Wahluke project, in the work you had done.

A. Yes, that was the idea in taking it over first, as security pending some later adjustment.

Q. Now, did you know of your own knowledge how DeLarm was to pay for this ranch?

(Testimony of Charles A. Kilbourne.)

A. No. I knew nothing about it until after he had made the deal.

Q. You didn't know then, of your own knowledge, whether he was trading bonds for the ranch, or not?

A. I didn't know it, but I certainly would assume that was the way he was acquiring it, either bonds or lands or some other.

Q. You were satisfied yourself at the time you bought the place that he didn't have the actual cash to pay for it?

A. Well, I don't believe that he did; no, I am sure he didn't now.

Q. That is, that he would either trade bonds or property, or something of that kind?

A. Yes.

Q. Now, in reference to the \$17,000., was that additional work to be done outside of the \$43,000?

A. That was additional work to be done.

Q. Now, I haven't got that clear in my mind yet, about that \$43,000. indebtedness, whether that was included in the \$17,000 or not.

A. No, certainly not. The \$17,000. was an additional amount, estimated cost of finishing the first unit.

Q. Now the \$43,000. then was the indebtedness that they had incurred against you for the work you had already done at the time the Tobey ranch deal was made.

A. The \$43,000. how is that?



(Testimony of Charles A. Kilbourne.)

Q. I say that was the work that you had already earned at the time the Tobey deal was made?

A. Yes, that was already earned.

Q. And the \$17,000., that was what you were to do extra?

A. Was yet to be done, yes, sir.

Q. And for the place, then, you were allowing the \$43,000. that would clean up the debt for the work you had already done, and the \$17,000 was to be added to that?

A. Yes, sir.

Q. Now, out of the \$43,000. for the work you had done, you were to pay this dredging Company, weren't you?

A. Out of the \$43,000.

Q. Yes.

A. Yes, sir.

Q. You were to pay that?

A. We were to pay all *out* \$7500. plus some expenses.

Q. You weren't to pay the \$7500?

A. The \$7500. was assumed by DeLarm in final settlement. He was to furnish the \$7500. and pay certain attorney's fees, and the Kilbourne Clark Company—I should say E. C. and C. A. Kilbourne, had arranged to pay the balance, and furnish adequate security for it, and the Bridge Company were ready to release the lien.

Q. Their claim was a little more?

(Testimony of Charles A. Kilbourne.)

A. Their lien was \$22,000. or \$25,000. something like that.

Q. Weren't you originally, as far as the Dredge Company was concerned, weren't you originally liable for it?

A. Yes, sir, we were back of them.

Q. They were sub-contractors under you?

A. They were our sub-contractors.

Q. And the contract between you and DeLarm wouldn't relieve your company and yourself from liability to that company?

A. No, it wouldn't relieve the Kilbourne & Clark Company from liability to the Puget Sound Bridge & Dredging Company.

Q. You had guaranteed them they would get their pay?

A. Yes, sir.

Q. Now, when you made the deal with Wakefield, when you made that mortgage, had you had much acquaintance with him?

A. None whatever, except I knew that he was an attorney. from hearsay, in practice in Seattle.

Q. Did you know of the circumstances of the deal between Wakefield and Clapp and Lutz? That is, when their papers were made, etc.? That is, did you know of it?

A. You mean drawing the mortgage.

Q. Yes.

A. Yes, I knew of that.

(Testimony of Charles A. Kilbourne.)

Q. You knew that the Wakefield mortgage was not recorded at the time it was transferred over to Senator Clapp and Lutz?

A. That the mortgage to Wakefield from me?

Q. Yes.

A. No, sir, I don't know that. My mortgage to Wakefield, and the assignment from Wakefield were put of record simultaneously, I understand.

Q. Wakefield never paid you?

A. Wakefield never paid me.

Q. You *did* this, as I understand it; This transaction, as I understood you was at the request of DeLarm. That is, you had made arrangements whereby this \$7500. was to go to the Dredging Company, and the \$2250, or whatever it was, to the Moran Company?

A. There was nothing out of the mortgage to go to the Moran Company. That wasn't provided for in this particular item.

COURT: \$10,000. was to go to DeLarm.

A. Payment for the release.

Q. I thought *the* included the two accounts, the Dredging Company to get \$7500. and Moran to get \$2250. That is the way I understood it. I may be mistaken. Do you know about that yourself?

A. Yes, sir, I do.

Q. How was that?

A. \$10,000. of the \$17,500. mortgage was to be

(Testimony of Charles A. Kilbourne.)

turned over to DeLarm upon receipt of it from Clapp by Wakefield. Then Wakefield was instructed to bring the other \$7500. to me, and I would go then to the Puget Sound Bridge & Dredging Company, and turn it over directly to them, to release that lien.

Q. Now, DeLarm had agreed before that to pay that Dredging Company personally?

A. Which? The \$7500?

Q. Yes.

A. Yes, he had; *je* had agreed to furnish \$7500. to be paid over to them.

Q. How was it you were going to pay it out of this ranch? Put a mortgage upon this ranch to pay it?

A. The reason why, was because the Puget Sound Bridge & Dredging Company were anxious for their money, and naturally they would press Kilbourne & Clark Company for it, and it offered an easy solution, then, to settle in some other way—for us to furnish the money out of the proceeds of that mortgage to the Puget Sound Bridge & Dredging Company, and then look to DeLarm to pay it from some other source. He, of course, made representations at that time, that he had certain deals pending that he would have in a few days or a short time, some other source out of which to pay it; and at the same time he was to pay the Moran Company account.

Q. From the experience you had had with De-

(Testimony of Charles A. Kilbourne.)

Larm up to that time, you had found out he wasn't very prompt in his payments?

A. Mr. DeLarm's promises were seldom carried out. Whatever he put out as statements of facts to us whenever we made any attempt to verify it, was always borne out. We never caught DeLarm in a deliberate lie, and we had a good deal of confidence in him.

Q. Well, you did find out along the line, though, that a whole lot of those statements were not true?

A. Not what he put out as statement of facts to us. Everything we investigated—for instance, when he borrowed \$3,000. from the company, he said he would have that money come back in a certain time. We went and investigated, and found it to be so. He said the Washington Trust Company was the trustee; we found that to be so. He made a great many promises that he never carried out, and still he had a way about him that up until January, 1912, I really believed the fellow was sincere and honest, and would carry out his scheme.

Q. You found out later?

A. I found out subsequently the whole affair was crooked.

MR. WOOD: It is immaterial what he found out later.

Q. Now, then, as I understand it, this \$7500. was practically to hel - - that is, in two ways; you practically loaned that to DeLarm?



(Testimony of Charles A. Kilbourne.)

A. Did it to help myself.

Q. That is—see if I have it right—in the first place DeLarm had agreed to pay you \$7500. on what we call the Dredging account, and he hadn't done it, and *they* you were responsible to the Dredging Company by reason of being the principal contractor for the \$7500., and you didn't have that money yourself to pay for it, and for that reason you got this second loan, what is called the Clapp loan?

A. Yes, sir.

Q. You got that because you didn't have the ready money, and used this place to get security, and they depending on Mr. DeLarm, or his promises, to get back and help you out, you put this mortgage on this place that you got from the Tobeys, because you wanted to be relieved from the liability you had with the Dredging Company. They were demanding money all the time from you. That is the reason you put the mortgage on; the reason you turned the \$7500. over to Wakefield—that he would do as he agreed to do, and see that that account was paid. Now, am I right about that?

A. You are right and wrong. I was not depending *upon* Mr. DeLarm in the matter. He owed us the \$7500., and this didn't change the relation at all, had nothing to do with DeLarm; it was simply to relieve the situations as far as the Kilbourne Clark Company was concerned, and the Puget Sound Bridge & Dredging Company. DeLarm really didn't

(Testimony of Charles A. Kilbourne.)

enter into the \$7500. proposition in any way, shape or manner, except incidentally it was a part of that loan out of which he was to have the \$10,000. He still owed us the \$7500. just as he did before. It would have that effect, but that wasn't primarily the reason, to help him.

MR. WILLIAMS:

Witness handed letter dated July 7, 1911, from the Kilbourne & Clark Company, by C. A. Kilbourne, President, identified as the signature of the witness marked "Plaintiffs' Exhibit 148."

We had taken over supplies from the Puget Sound Bridge and Dredging Company as late as 1911.

In June, 1911, we paid the Puget Sound Bridge & Dredging Company \$2500. They had rendered at that time an additional *bil* to us for \$1000. for attorney's fees, and an additional bill for material furnished to E. C. and C. A. Kilbourne and other matters, so I paid them \$2500.

Q. That \$1,000. rendered you as attorney's fees you have included in this bill of \$17,000 haven't you?

A. That I think is included there, attorneys fees and interest. I think something of that kind. That total amount was \$2500. and I deducted \$1500. as Kilbourne & Clark's part leaving \$1000. as the part brought about by the Columbia River Orchard Company.

Adjourned until 1:30 P. M.

(Testimony of Charles A. Kilbourne.)

Monday, May 19, 1913, 1:30 P. M.

C. A. KILBOURNE, resumes stand.

Witness' attention was called to Page 118 of the Ledger, previously produced in Court under Columbus River Orchard Company's account, and witness' attention called to the column representing the journal page.

Q. Have you brought your journals with you?

A. Nos, sir. I have here only the ledger of the Kilbourne & Clark Company.

Q. Then the items, as they appear upon your ledger are identical as those upon the statement introduced in evidence, are they not?

A. I haven't compared them myself all the way thru, they seem to have been experted by Mr. House, the Government expert who simplified and checked up the account.

Q. I hand you Plaintiffs' Exhibit 135, and ask you if the ledger doesn't exhibit exactly what is on that statement of account?

A. I am unable to say. That was compared at the time. It will take some time go thru. I would like to ask if this is our copy. There was a verified copy signed by both the Columbia River people and our own auditor—an accepted copy.

Defendants' Exhibit M, produced, is that the one you refer to?

A. Yes, sir.

(Testimony of Charles A. Kilbourne.)

Q. Now, is that exhibit the status of your ledger account?

A. This apparently brings it down to date of settlement September 22nd.

Q. And the additional statement you furnished, brings it down to the end?

A. This statement itself would not correspond exactly with the face of the ledger, for the reason that there are some adjustment entries made here, apparently later, but if it is worked out, the balance due would be the same.

Q. The additional are entered on your Exhibit K, are they not?

A. There are two or three items not in there, on this statement, which appears on the ledger. With this addition made, I think the amount would *agree* that is, the totals would agree. I haven't checked them through, all the items.

Q. Now, Mr. Kilbourne, you have turned these books over to us for our examination, but will you tell me how we can get any *more* information from your books that we have from these statements already in evidence?

A. No, sir; I think the statements are supposed to cover the situation entirely, as far as I can tell now.

Q. Now, have you a separate account with the Puget Sound Bridge & Dredging Company, or those matters between you and them that is charged in the Columbia River Orchard Company account?

(Testimony of Charles A. Kilbourne.)

A. There is a separate account with them; I am not sure that it is evidenced by a ledger account, or the unpaid vouchers on file in the company's papers. I don't seem to find it here anyhow. It may be in the book.

Q. Let me call your attention to the index 109.

A. Puget Sound Bridge & Dredging Company 109. There may be a separate account in here; I am not sure. It is quite likely, though, that it is carried as a vouchers payable account. You will find that in here in the Vouchers Payable Account.

Q. What I desire to know, Mr. Kilbourne, is whether or not your books would give us any more information about these various accounts than we find in these statements.

A. I think—the statement which is accepted up to a certain date by DeLarm for the company, and signed by our own auditor for the Kilbourne & Clark Company, that is right up to that point, and the few entries shown in the ledger since that time would finish it up as far as the Kilbourne & Clark Company is concerned.

Q. In order to find any other information about the status of these accounts, we would have to go back to your journal to find them?

A. Might have to go to the journal, might have to go to the sales ledger.

Q. Is there a separate account of Moran account in there?



(Testimony of Charles A. Kilbourne.)

A. I think that would also be carried under Vouchers Payable, general account. That also is an accepted account by the Columbia River Orchard Company.

Q. Have you a separate account with Curtis & Company?

A. No, sir, we have not.

Q. Then you have no separate accounts of any of those parties?

A. Not in the form of a ledger account here. Simply all of their accounts—their papers are vouchered by months, and written in unpaid vouchers, and carried in a general account, known as Vouchers Payable, or Audited Vouchers.

Q. Then, in order to get any more information than we have already had in these various statements, we would have to go to these various books which are not here.

A. Yes, sir; if you need any further information than that shown by the statements and *ledge* itself, I wouldn't be able to give it to you now. It is complete as it stands, as a matter of fact.

Q. Now, there was some testimony here about the Anderson account or some money received from a man by the name of Anderson. Do you remember about that?

A. No, sir, I do not.

Q. And from a man by the name of Espey or Ezra, \$1,000. or such a matter.

(Testimony of Charles A. Kilbourne.)

A. You mean a credit to the Columbia River Orchard Company?

Q. Yes.

A. If so, it would appear on the statement and the ledger as well.

Q. Didn't that come into your hands after the Tobey deal?

A. There is a credit of \$1,000. here in October.

Q. That was the Beckdorf sale, wasn't it?

A. I couldn't tell you. It doesn't specify; probably shown on that statement; doesn't show in the ledger, though, isn't itemized. Also a credit of \$350. cash on December (27), 1910.

Q. Now, isn't it a fact that you still held some securities at the time of the Tobey deal, and you received some on that later, afterwards. That wouldn't be on your account there in your ledger?

A. Not that I know of.

Q. Similar to the Burke Addition property?

A. Everything that we received has been credited.

Q. You wouldn't credit it up to them after you had taken over the Tobey ranch, would you?

A. If it was something on which we realized afterwards, we would credit them, yes.

Q. As I understand you, everything was wiped clean at the time of that transaction.

A. At the time of the transaction, yes.

(Testimony of Charles A. Kilbourne.)

Q. Anything you received afterward wouldn't be credited, would it?

A. There are some later charges, and I think some later credits, small items; however; something that had been overlooked, perhaps. You see the charges go up as late as the summer of 1911, but have nothing to do with the balance due at the time of the trade in March, 1911. I think all the credits are shown on the statement at that date.

Q. If you did have any securities at that time, then, they would belong to you on account of your agreement with DeLarm?

A. No, sir; not that I know of.

Q. You say everything was wiped clean at that time, and if you had securities, they would be yours, would they not?

A. If I had any securities, they would be, yes. That was the intention. I think everything had been cleaned up at that time, absolutely, as far as I recall now.

Mr. BRYSON: The Burke Addition property?

A. The Burke Addition property?

Q. Yes.

A. That was included in that transaction.

Q. You got that as well as the Tobey ranch?

A. Yes, sir, that was all included. I remember Mr. DeLarm speaking of that.

Q. Whatever you got from Espey, if any credit there, it was the same way?

(Testimony of Charles A. Kilbourne.)

A. If it was not already credited?

Q. Yes.

A. If it was not already credited, it was included in the transaction.

Q. Do you know anything else that was included?

A. I don't recall anything myself. I will state, however, I had nothing to do personally with this transaction. I don't know anything of the details of that. Dr. Kilbourne handled that.

**Redirect Examination.**

(Questions by Mr. WOOD.)

You didn't personally keep these books there, did you?

A. No, I was not the bookkeeper.

Referring to his previous testimony as to payments by the Columbia River Orchard Company, Witness said I hadn't been paid until the transaction of the Tobey ranch, then I was paid as far as the Tobey ranch paid for it, but he still owed us \$7500. and other items.

What I paid for the Tobey ranch was this—what we paid for it; the account of the Kilbourne Clarke Company, amounting to approximately \$43,000., although as a matter of fact, it was a little less; \$17,000. expended by E. C. Kilbourne and C. A. Kilbourne, in the completion of the original first unit, and \$10,000. to be expended for the estimated cost for construction of the second unit, which was done away with by a portion of the \$17,500 mortgage turned over

(Testimony of Charles A. Kilbourne.)

to DeLarm; so those three items amounting to \$69,000., would approximately cover the cost of the land to us, and if DeLarm paid back that \$7500., it would, of course, be reduced by that amount; a little more than \$60,000; he never paid it, so the actual cost to us was very close to \$70,000 at that time, not counting a lot of extras that are not in there, and interest, etc.

Q. As I understood you to say, that while the \$7,500, was to meet a debt from you to the Dredging Company, yet in the settlement DeLarm agreed to put up the money to pay that, and lift the lien from the pumping account?

A. He assumed that and the Moran account, but never paid either one of them.

Q. Now, this question that has been asked you about the Burke Addition property—what was the extent of that property?

A. The value of it?

Q. In amount, one lot, wasn't it?

A. Just a single lot in a rough ungraded section.

Q. What value?

A. A value was put on it to me of \$650., by a man living in the neighborhood. Other people have put it more. DeLarm himself called it \$1,000. in the final settlement which we had.

Q. Was that adjustment of the Burke property made before the Tobey deal?

A. No, sir. The final wind-up or settlement there



(Testimony of Charles A. Kilbourne.)

all included. The reason for leaving that in, I may say, was to cover certain items of interest, and that sort of thing, which had not been put in the statement.

### Recross Examination.

(Questions by Mr. WILLIAMS.)

In your statement of that, did you take into consideration that Reinmouth property in security for the Moran account, which Dr. Kilbourne holds?

A. He still has it, and is ready to turn it over to anybody that will take up the Moran account; that is, anybody authorized to do it.

Q. You didn't take that into consideration in what you paid for the property?

A. No, that is held by the Morans really. That is, they have a mortgage on that.

### E. C. Kilbourne Recalled.

(Questions by Mr. ERSKINE WOOD.)

Witness referring to the date that he had the conversation with Mr. Heaton, produced the check written that day and in answer to a question, stated: Check bears date May 19, Heaton testified that *said* it was between the first and seventh of April, and I looked at my expense account and found I arrived back in Seattle, on the 6th of April, and I said it might be along that time, but I said I didn't remember distinctly as it was not of much importance, but I remember distinctly of paying him the

(Testimony of E. C. Kilbourne.)

\$10. while he was in there; that if I could find the check book of Kilbourne & Clarke Company, I could fix the date exactly.

(Questions by Mr. C. E. S. WOOD.)

To same time I will ask some questions. I show you a letter from the Puget Sound Bridge & Dredging Company, dated January 25, 1912, addressed to Kilbourne & Clarke Company, with copy appended addressed to the Columbia River Orchard Company, and ask whether you received that letter, and whether it still remains in force?

Yes, sir. According to the terms of that letter, it was a 90 day contract, but they have renewed it, and Mr. Anderson, the one who is reorganizing the company for the bondholders, has the written statement of the Puget Sound Bridge & Dredging Company OK-d by Kilbourne & Clarke Company, that upon the payment of those sums, that the lien will be released; and also they have a statement from E. C. and C. A. Kilbourne, and E. C. Kilbourne and Kilbourne Clark Company, that as soon as that Moran account is paid, these two pieces of property, the Billings and the Reinmouth property, will be turned over to the successors of the Columbia River Orchards Company.

Q. That is the Tacoma Securities?

A. Yes, sir, never been held except as securities. That proposition was made by Mr. DeLarm and Mr. Green, in the office of the attorney for the

(Testimony of E. C. Kilbourne.)

Puget Sound Bridge & Dredging Company and signed by me as vice-president of the Kilbourne & Clarke Company, and accepted by Mr. DeLarm, as president of the Columbia River Orchards Company, and Mr. Green as their attorney.

MR. BRYSON: \$1,000. attorneys fees?

A. Yes.

MR. WOOD: With no objection, we will put this in.

Marked, "Defendants' Exhibit W."

Witness excused.

MR. WOOD: Defendants E. C. and C. A. Kilbourne rest.

### Mrs. Jennie C. Koppen Recalled

(Questions by Mr. WILLIAMS.)

Being asked about the work in April and May 1911, on the pumping plant,

Witness, said: I had been told before I went that the men weren't working very much, and I took a look as I went by, and though they had about fifteen or twenty men on the works about one third of them were idle each time I went by. Sometimes more than that, because I counted them, a good many times.

Q. Did you have a talk with Mr. DeLarm, in regard to that state of facts?

A. I did.

I had a talk with Dr. Kilbourne, about the Tobey

(Testimony of Mrs. Jennie C. Koppen.)

ranch. He said it was a very good one, he was well pleased with his bargain. I asked him particularly.

**M. Isabelle Forbes Recalled.**

(Questions by Mr. WILLIAMS.)

Letter dated April 8, 1911, addressed to Mr. Leet, signed by George C. Hodges, identified, introduced "Plaintiff's Exhibit 149.

**[E. O. Tobey Recalled.]**

E. O. TOBEY, being recalled as a witness, was reminded of E. C. Kilbourne's testimony that E. O. Tobey, (the witness) was in the office of the Oregon and Washington Trust Company on the 15 of March 1911 at the time the deeds were executed, and was asked the fact was. He answered "I don't know a thing about any deeds whatever."

Asked whether he was present at any time with Mr. Kilbourne he said in substance as follows:

Why, my brother was living here in Portland, I happened to be in here, and he said they were going over to meet Mr. Kilbourne, and asked me to go with them. I had met Mr. Kilbourne, I think it was in the office of a lawyer by the name of Chamberlain, if I remember right. There were some papers that I think, I had to sign, but I don't remember whether I signed them that time or not, if I remember right, the papers were sent over across the

(Testimony of E. O. Tobey.)

river, in a Notary Public's office there. That is the first time I saw Dr. Kilbourne.

### **W. L. Tobey Recalled.**

Referring to the time that Dr. Kilbourne, was with witness at the ranch for the examination of it, question was asked, where did they stay that night if you know.

A. They traveled with me to Arlington, that evening. I would say we got there about 7 o'clock, it was after dark, after leaving the ranch, it was quite late in the evening and driving out of the field on the south side of the ranch, we followed the county road west towards Olex, and as described, Olex lies down in quite a deep canyon, and there is just one point in going over that road, where you can look over the bank and see Olex and as we passed that, I called their attention to the sight of the town of Olex, and we drove from there towards Arlington, and I remember that was the particular time, and I remember it was intensely dark, so dark that I couldn't see to follow the road with the team, and I would say about two or three miles before reaching Arlington we came to a little shack house where there were some people camping and we asked if we couldn't get a lantern to light us into Arlington. They said no, so we had to go into Arlington in the dark as best we could.

I think, in my former testimony, I thought we



(Testimony of W. L. Tobey)

went into Portland, that night, but after considering the matter, I think we stayed there over night and went in the next morning into Portland.

Q. Dr. Kilbourne, spoke about one of the combined harvesters being an old one that hadn't been used for several years, what is the fact about that?

A. It hadn't been used, that is a part of the time that we owned it, it wasn't in use, but it wasn't used because the machine was worn out, the machine when we left the ranch was in good running order, that is capable of being used. There was one year, we didn't use it because the grain was short, and we thought we could do better work with headers, and another year, we were then engaging a man to run it, that didn't understand the work, and he made a failure of it. Mr. Wade, preferred to use a header rather than to use the combined.

### **Frank L. Tobey Recalled.**

The night that Dr. Kilbourne and Mr. DeLarm, were out to the ranch, February 1911, I stayed in Olex, that night. I walked down from the ranch to Olex. At that time there was only one stopping place in Olex. I didn't see Dr. Kilbourne and DeLarm there, next I saw them was in Portland. We only had one combined harvester on the place. It was in good condition, other than it had been through a long season's run and of course required more or less repairing before it could be used again. The

(Testimony of Frank L. Tobey.)

harvester was in useable condition.

Q. I will ask you if, E. O. Tobey, your brother was with you in the office of Mr. Hodges, the day you made out the deeds.

A. No, sir. The only time that I remember of him being with us in connection with this business was the time we went to Mr. Chamberlain's office, there was an affidavit he was required to make out, and Mr. Chamberlain made them out, one for him and one for myself, and we signed them.

Affidavits by C. A. and E. C. Kilbourne, introduced in evidence marked "Exhibit 150, and 151.

**Plaintiffs' Exhibits.****1.**

Same as Exhibit A attached to complaint.

**2.**

Escrow agreement; Portland, Ore Mar. 15, 1911, Received from Oregon & Washington Trust Co. & W. L. Tobey & Frank L. Tobey, the following documents which we hold in escrow subject to written instructions accompanying same. 1 package contains 1 note signed by Tobeys for \$3000.00 Columbia River Orchard bonds No. 2001 to 2010 inclusive of \$100 each amounting to \$1000 & No. 3427 for \$5000 making \$6000 in all. 2nd Package 5 deeds and 1 bill of sale to *Toby* ranch. Columbia River Orchard Bonds No. 2001 to 2020 inclusive \$100 each amounting to \$1000 & No. 3401 to 3426 inclusive of \$5000 each amounting to \$130,000 making \$131,000 in all Delivered 3|24|11 File away H. T.

**3.**

Letter dated Portland, Oregon, March 15, 1911, to Hartman & Thompson, Oortland Oregon, signed by O & W. E. Co. by George C. Hodges, trustee, and W. L. Tobey and F. L. Tobey, instructing bank to hold the \$6000 in bonds mentioned in Ex. 2 as security for the \$3000 note.

**4.**

Deed dated Sept. 22, 1911, from Northern Pacific Railway Company to Columbia River Water Com-

pany, consideration \$2894 conveying Lot 4 Sec. 3 twp. 13 N. R 25 E. of W. M. and a strip 50 feet wide across sections named and strip 25 feet wide across other sections named, Signed, witnessed and acknowledged

## 5.

Agreement dated May 1, 1910 between Columbia River Orchard Company (company) and the Washington Trust Company of Seattle (trustee). The company hereby binds itself to deposit in the hands of the trustee good valid and solvent securities consisting of mortgages, sales contracts, desert land mortgages, deed to real estate, bonds, securities and other collateral of the face value of \$125.00 for each \$100 of bonds issued hereunder and in like manner to deposit with said trustee and to keep in the hands of said trustee at all times, good, valid and solvent securities equal to 125 per cent face value of the total of all bonds issued by it.

## 6.

Water Mortgage. Virgil H. Robertson to Columbia River Orchards Co. dated Jan. 22, 1910 \$16,000; due May 1, 1911; covering N. E.  $\frac{1}{4}$  of Sec 24, twp. 14 N. R. 25 E. of W. M. Desert Land Entry; Conditioned as in Ex. 42.

## 6a

Assignment to Col. River Orchard Co.

## 6b

Assignment to Washington Trust Co.

6c

Affidavit of W. E. DeLarm (See form, Ex. 47)

7.

Desert Land Mortgage, Emil F. Cords to Columbia River Orchards Company, dated June 10, 1910 \$16,000; due Oct. 11, 1912; covering E $\frac{1}{2}$  of N. E. $\frac{1}{4}$  and E. $\frac{1}{2}$  of N. W. $\frac{1}{4}$  Sec. 8 Twp. 14, N. R. 26 E. of W. M. Desert Land Entry. Same conditions as in Ex. 42.

8.

Water contract, Frederick C. Koppen to Columbia River Orchards Company dated May 21, 1910, \$16000; due Apr. 1, 1914; covering N.E. $\frac{1}{4}$  of Sec. 4, twp. 14, N. R. 26 E. of W. M. Land owned in fee by Koppen. Same conditions as in 42 with reference to expiration.

8a and 8b.

Assignments of Ex. 8.

9.

Desert Land Mortgage, Alfred Gagner to Columbia River Orchards Co., dated Aug. 25, 1908 \$16000; due Apr. 1, 1911; covering S. W. $\frac{1}{4}$  sec. 24, twp. 14 N. R. 25 E. of W. M. Desert Land Entry, Condition same as 42.

10.

Desert Land Mortgage, Laura Wattle to Columbia River Orchards Company, dated May 17, 1909 \$16000; due May 16th, 1911; covering N. W. $\frac{1}{4}$  sec. 18, twp. 14 N. R. 26 E. of W. M.; same conditions as in 42.



10a and 10b.

Assignments of 10.

10c

Affidavit of W. E. DeLarm, Same form as Ex. 47.

11.

Received of Washington Trust and Savings Bank of Seattle, Washington, the following described papers or instruments in connection with securities held by said Washington Trust and Savings Banks, formerly The Washington Trust Co., of Seattle, when acting as Trustee for Columbia River Orchard Company and now turned over to Oregon & Washington Trust Company, a corporation organized and existing under and by virtue of the laws of the State of Oregon, said last named company having been substituted as trustee for Columbia River Orchard Company.

A promissory note of Laura Wattle and Frank Wattle to the Columbia River Orchards Company for \$16000, dated May 17th, 1909, due May 16, 1911.

Also Desert Land Mortgage executed May 22, 1909 by said Laura Wattle and Frank Wattle to the Columbia River Orchards Company on the Northwest quarter of Section 18, Twp. 14 N. R. 26 E. W. M., Grant County, Washington;

Also affidavit of W. E. DeLarm, setting forth under oath on May 7th, 1910, that he is President of Columbia River Orchard Company, and that the above mortgage is a good, valid and solvent security.

A promissory note of Frederick C. Koppen and Jennie C. Koppen to Columbia River Orchard Company for \$16000, dated May 21st, 1910, due April 1st, 1914. And water right contract for land executed by said Koppens to said Columbia River Orchard Company covering the northeast quarter of Section 4 Twp. 14. N. R. 26 E. W. M. in Grant County, Washington.

An affidavit duly sworn June 7th, 1910, of W. E. DeLarm, that he is president of the Columbia River Orchard Company, that said contract is a good valid and solvent security.

A promissory note of Emil F. Cords to The Columbia River Orchard Company for \$16000, dated May 21, 1909, due October 11th, 1910;

Also a Desert Land Mortgage from Emil F. Cords, to The Columbia River Orchards Company dated May 21, 1909, covering the North half of Northeast quarter and East half of Northwest quarter, Section 8, Twp. 14, N. R. 26 E. W. M. in Grant County, Washington.

An affidavit subscribed June 7th, 1910 of W. E. DeLarm that he is president of said Orchard Company, that said note and mortgage are good, valid and solvent securities.

A promissory note of V. H. Robinson and Gertrude Robinson to The Columbia River Orchard Co., for \$16,000 dated January 22nd, 1910, due May 1st, 1911. A Desert Land Mortgage from Virgil E. Robinson and Gertrude Robinson to The Columbia River Or-

chard Co. dated January 22nd, 1910, covering the Northeast quarter of Section 24, twp. 14 N. R. 25 E. W. M. Grant County, Washington.

A promissory note of Alfred Gagner and Salinda Gagner to the Columbia River Orchard Company for \$16000 dated August 25th, 1909, due April 25th, 1911, and a Desert Land Mortgage from said Alfred and Salinda Gagner to said Orchard Company dated August 25th, 1909, covering southwest quarter of Section 24, Twp. 14 N. R. 25 E. W. M. Grant County, Washington.

Affidavit subscribed August 19, 1910, of W. E. DeLarm, that he is the president of said Orchard Company and that said Desert Land Mortgage is good, valid and solvent security.

Receipt also covers assignments of said instruments and all notes endorsed over without recourse.

Portland, Oregon, March 28, 1911.

**OREGON & WASHINGTON TRUST CO.**

By George C. Hodges, Trust Officer.

12.

State of Washington,  
County of King,—ss.

W. E. DeLarm, being first duly sworn, on oath says: that he is president of Columbia River Orchard Company, a corporation organized and existing under the laws of the State of Washington; that the Desert Land Mortgage hereto attached covering Desert Land Entry No. 01079, is a good valid and solvent security.

W. E. DeLARM.

Subscribed and sworn to before me this 7th day of May, 1910.

GEORGE A. CUSTER,

Notary Public in and for the State of Washington,  
residing at Seattle.

(Seal)

12a

Same form as Ex. 12 covering Emil Cords mortgage dated June 7, 1910, Desert Land Entry No. 1177.

12b

Same form as Ex. 12 covering F. C. Koppen mortgage N. E.  $\frac{1}{4}$  Sec. 4, Twp. 14, N. R. 26 E. W. M.

12c

Same form as 12.

13.

Letter dated February 3, 1911 to Washington Trust & Savings Bank, Seattle Wash.

We acknowledge receipt of yours of Jan. 31st, in which you resign as trustee for the Columbia River Orchard Company, under trust agreement of May 1st, 1910.

Kindly assign and turn over all securities and papers which you may have in connection with such trusteeship to the Oregon & Washington Trust Company of Portland, Oregon, who we have appointed to accept such trust. We hereby accept your resignation.

COLUMBIA RIVER ORCHARD COMPANY,

By W. E. DeLARM, Pres.

Attest: A. J. Biehl, Secretary.



## 14.

Letter dated Seattle, Wash., Feb. 7, 1911 addressed to Columbia River Orchard Company.

Your favor of the 3rd inst., received and enclosed find copy of letter of even date to the Oregon, Washington Trust Company of Portland, Oregon, which explains itself.

J. H. EDWARDS, Vice president.

## 15.

Letter dated Seattle, Washington, Feb. 7, 1911, addressed to Oregon Washington Trust Company, Portland, Oregon.

We have resigned as trustee for the Columbia River Orchard Company under trust agreement of May 1st, 1910. Said company is asking us to assign and turn over all securities and papers in connection with said trusteeship to you, stating that you have been appointed to accept such trust. If you will kindly execute in proper form your acceptance of said trust and have same recorded in Grant County, Washington, and forward us a copy of said acceptance, certified by the recorder of said county, we will then be glad to take up with you the question of transferring the securities we hold in connection with said trust.

J. H. EDWARDS, Vice president.

## 17.

Assignment by Washington Trust and Savings Bank to Oregon and Washington Trust Co., dated March 16, 1911, the following instruments:



A certain desert land mortgage dated May 22, 1909, made and executed by Laura Wattle and Frank Wattle, her husband;

A certain water right contract dated May 21, 1910, made and executed by Frederick C. Koppen and Jennie C. Koppen, his wife;

A certain desert land mortgage, dated May 21, 1909, made and executed by Emil F. Cords, a bachelor;

A certain desert land mortgage dated January 22, 1910, made and executed by Virgil H. Robinson and Gertrude Robinson;

A certain desert land mortgage dated August 25, 1909, made and executed by Alfred Gagner and Salinda Gagner, it being intended hereby to substitute the party of the second part in lieu of the party of the first part as trustee under a certain trust agreement dated May 1, 1910, wherein the Columbia River Orchard Company is party of the first part and the Washington Trust Company of Seattle, (Now known as The Washington Trust and Savings Bank) is party of the second part.

Acknowledgment attached.

By J. H. EDWARDS, Vice president.

Attested and seal attached.

18.

Letter dated Portland, Or., Dec. 29, 1910 addressed to W. E. DeLarm, Seattle, Washington by Edward J. Brazell.

It will be an easy matter to organize and incorpo-

rate for the purposes which you intend. Payment of the stock may be made in any property of value just as any ordinary private corporation.

Regarding the proposed arrangement of having the Trust Company be a depository, and accept deposits of money from its stockholders and issue certificates of deposit in return, there is much more difficulty.

(Discussion of Oregon Bank Laws omitted.)

We have been trying to think out some scheme to avoid a conflict with this act, and yet leave you to perform some of the functions which you desire. One plan that could be worked successfully would be to deposit money with the Trust Company as a loan to the Company, and have the latter issue its promissory note payable either on demand or a date in the future. The notes could circulate as a medium of exchange like currency fully as well as a certificate of deposit, and it seems to me ought to be as satisfactory to you as the certificates of deposit.

The issuance of notes each time a deposit is made might be a trifle cumbersome compared with other methods, but not to such an extent as to render its use valueless. The deposits you receive you could use just the same as a bank could; and the issuance of demand notes would provide a substitute for checks, for the money on them could be secured at any time on presentation. If you expect to make use of much of the money deposited with the Trust Company, of course, you would have to keep enough

cash on hand to pay the demand notes, but the time notes could be invested or used.

## 19.

Meeting of Incorporators of Oregon and Washington Trust Company, Jan. 19, 1911, present G. C. Hodges, F. H. Garretson, and E. J. Brazell.

E. J. Brazell was authorized to open stock subscription books.

## 20.

Formal subscription to capital stock of the Oregon and Washington Trust Co. signed as follows:

Names	Number of Shares	Amount
A. J. Biehl .....	166 shares...	\$16,600.00
W. E. DeLarm .....	166.....	\$16,600.00
G. C. Hodges .....	166.....	\$16,600.00
H. H. Humphrey .....	1.....	\$ 100.00
E. J. Brazell .....	1.....	\$ 100.00

## 21.

Minutes of the 1st meeting of stockholders Oregon and Washington Trust Co. Portland, Oregon, January 25, 1911 at 9:30 P. M. all of the corporators and stockholders, to-wit: (Naming them as set out in Ex. 20.)

Report of Incorporators.

Articles of Incorporation (Set out in full).

The enterprise, occupation and business pursuits for which this corporation is formed and in which it will engage are and shall be:

(1) To accept trusts and act as trustee, in any lawful business or proceeding whatsoever. To carry on a

general trust business and to do the several things necessary for such purpose.

The capital stock of this corporation shall be Fifty Thousand Dollars, divided into five hundred shares of the par value of One Hundred Dollars each.

Thereupon the stockholders proceeded to the election of five directors, which election resulted in the election by unanimous vote of each of the following stockholders, to-wit: W. E. DeLarm, A. J. Biehl, G. C. Hodges, H. H. Humphreys, and E. J. Brazell, as a director of said corporation for the term of one year and until their successors shall be elected and qualified.

## 22.

Minutes of 1st meeting of directors,  
Portland, Oregon, January 25, 1911.

The board of directors of the said Oregon & Washington Trust Company, to-wit: W. E. DeLarm, G. C. Hodges, H. H. Humphrey and E. J. Brazell, each having theretofore taken an oath to faithfully and honestly discharge the duties of a director of said corporation, all met, pursuant to appointment for the first meeting of said board of Directors, A. J. Biehl, the remaining director of said corporation, being absent.

A. J. Biehl, was unanimously elected President. G. C. Hodges was unanimously elected first Vice-President, Treasurer and Trust Officer and Manager. H. H. Humphrey was unanimously elected 2nd vice-president, W. E. DeLarm was unanimously



elected 3rd vice-president. E. J. Brazell was unanimously elected Secretary.

An offer was then made by the Columbia River Orchard Company, a corporation having its principal place of business in Seattle, State of Washington, to have this company act as trustee for the bond issue of the said Columbia River Orchard Company., which said proposed bond issue is to be of the denomination of \$100.00 and to be progressive; the remuneration for said services to be \$100.00 for the first \$100.00 bond and 25c for each additional bond. Offer accepted.

An offer was then made by the Washington Orchard, Irrigation and Fruit Co., a corporation having its principal place of business in Seattle, Washington, to have this corporation act as trustee and to certify to the issue of 1000 Series "A" Bonds of the denomination of \$100.00 each, and 3000 Series "B" bonds of the denomination of \$100.00 each, of the said Washington Orchard, Irrigation and Fruit Co., the remuneration for services rendered in said capacity as trustee to be \$100.00 for the first bond and 25c for each additional bond. It was ordered that the offer be and the same is hereby accepted, and the trust officer is directed and empowered to communicate such acceptance to the Washington Orchard, Irrigation and Fruit Co., and to conclude the contract on behalf of this company.

It was ordered that the proposition of the Washington Orchard, Irrigation and Fruit Co. to pay to this



corporation for its services in acting as trustees and certifying to the bonds and also for the services of this corporation in acting as trustee for the proposed progressive bond issue of the Columbia River Orchard Co. of \$1700.00 by delivering to this company seventeen Series "A" 7 per cent Investment Bonds of the Columbia River Orchard Co., be and the same is hereby accepted, and the Trust officer is directed and empowered to communicate such acceptance to the Washington, Orchard, Irrigation and Fruit Co., and to accept the said 17 Series "A" 7 per cent Investment bonds of the Columbia River Orchard Company on behalf of this company.

It was ordered that the stock of this corporation be payable in cash only, and the officers be required to have the cash in hand before issuing the same.

It was ordered the Treasurer be instructed and ordered to sell and dispose of all bonds acquired and owned by this corporation, and also all bonds hereafter acquired and owned by this corporation at par and for cash only.

23.

Letter dated Portland, Oregon, May 15, 1911 to F. C. Koppen, Wahluke, Wash., by Oregon & Washington Trust Co., by E. J. Brazell, Secretary.

We beg to say with regard to the Columbia River Orchards Company's twenty year 7% bonds, for which we are the Trustee:

These bonds are a first obligation on all the holdings of the issuing company, and each \$100 bond is

secured by first mortgage for \$125 on real estate, the valuation of which is appraised at three times the value of the mortgage. That is to say, every mortgage for \$125 is secured upon property worth \$375 or more. These mortgages are held by us as trustees for the benefit of the bondholders. These bonds are further secured by the absolute and unqualified guarantee of the Washington Orchard Irrigation and Fruit Company, on each bond.

The Irrigation Company, to further secure their guarantee and to provide a sinking fund to pay these bonds have deposited with us, sales contracts on land already sold to the amount of \$125 for each \$100 guaranteed. These contracts run from three to eight years and the principal and interest will be both paid to us and the money will form a sinking fund to take care of these bonds. This will, in our opinion, automatically retire them in about eight years. The bonds are only issued upon the amount of collateral the company is able to put behind each bond, on the above basis.

We understand the company is now practically out of debt with the exception of the bond issue. We also understand, on good authority, that the company has one of the finest propositions in Washington and the men behind it are well able to carry it on successfully.

24.

Domay mortgage introduced as 42.

## 25.

Agreement between Columbia River Orchard Company called the Company, and Oregon and Washington Trust Company, called the trustee, dated Feb. 1, 1911.

First, The Company hereby binds itself to deposit in the hands of the trustee, good, valid and solvent securities consisting of mortgages, sales contracts, desert land mortgages, deeds to real estate, bonds, securities and other collateral of the face value of \$125.00 for each \$100.00 of bonds issued hereunder, and in like manner to deposit with said Trustee and to keep in the hands of said Trustee at all times. good, valid and solvent securities equal to one hundred and twenty-five per cent face value of the total of all bonds issued by it.

The company at the time of depositing any desert land mortgages or other collateral with the trustee, shall attach thereto an affidavit of its president, that said mortgages and other collateral are good, valid and solvent securities, and said affidavit shall be sufficient evidence of the truth of the statements therein contained.

(Paragraph providing sinking fund to pay bonds at maturity)

(Paragraph providing for interest payments) provided however, when in the discretion of the board of trustees of the company, it would inure to the benefit of all parties interested so to do the company may take ninety days additional time in which to make

a deposit, with the trustee of any interest due upon any bond issued hereunder.

Third, (Provides for division of bonds into series and for sale of securities to pay interest on bonds on petition of 50% of the holders of any series.

Fourth, The company reserves the right to mature or cancel the bonds secured as aforesaid, or any series of bonds, before the expiration of the time named in said bond, on payment of the principal of said bond, the accrued interest and sixty days' advance interest.

Fifth (Omitted)

Sixth, It is mutually understood and agreed that the company may, at any time, withdraw from the trustee any securities deposited with the trustee under this agreement, upon substituting therefor other good, valid and solvent securities equal in value and amount to the securities so withdrawn, or by depositing cash equal to the value and interest on these bonds. (Provision for withdrawing securities on retiring bonds.

Seventh, provides for such compensation for trustee as may be agreed upon.

Eighth, The trustee, will, upon request of the company, certify all bonds issued hereunder.

Ninth, (Provides for company to defend suits

Tenth, (Provides for substitution of trustee in case of failure to act or resignation. Said trustee shall not be liable for any act or thing done by it hereunder, except for gross negligence.



Eleventh, The amount of bonds which may be issued of any series under this trust agreement shall be limited only by the amount of collateral deposited with the trustee to the extent of One Hundred and Twenty-five per cent for every hundred dollars of bonds issued hereunder.

(Form of bond omitted)

For the debts and bonds hereby secured the Columbia River Orchard company is liable, and any deficiency after exhausting the mortgaged property and security, may be enforced against the Columbia River Orchard Company, but not against the officers, directors, trustees, incorporators or stockholders hereto, and it is agreed by every owner of every bond issued hereunder, that the existing and all future directors, trustees incorporators and stockholders shall not be individually or jointly or collectively liable to any extent or any purpose, with respect to said bonds or any of them.

Signatures and acknowledgement.

26.

Agreement between Columbia River Orchard Company and Oregon and Washington Trust Company, dated January 31, 1911. After reciting the trust agreement (Exhibit 5) It is hereby agreed by and between the parties hereto—to perform all of the conditions of said original trust agreement—said second party does hereby accept said trust and hereby agrees to perform all the conditions incumbent



upon said Washington Trust Co of Seattle, harmless from all the obligations thereof

## 32.

Water mortgage Jennie C. Koppen to Columbia River Orchards Company, dated April 1910, due May 15, 1911, for \$16,000 covering E $\frac{1}{2}$  of S.E. $\frac{1}{4}$  N.W. $\frac{1}{4}$  of S. E. $\frac{1}{4}$  and N. E. $\frac{1}{4}$  of S. W. $\frac{1}{4}$  of sec. 30, twp 14, N. R. 26 E. Desert Land Entry. (Same conditions as in Ex. 42)

## 33.

Desert Land Mortgage W. E. Stickel to Columbia River Orchards Co. dated Jan. 22, 1910, \$16,000, due May 1, 1912, covering N. E. $\frac{1}{4}$  of sec. 18 Twp. 14 N. R. 26 E. of W. M. (Some conditions as in Ex. 42.)

## 34.

Desert Land Mortgage James Perry to Columbia River Orchards Co. dated Jan. 22, 1910 \$8,000, due May 1, 1911, covering E $\frac{1}{2}$  of S. E. $\frac{1}{4}$  of sec. 34 twp. 14 N. R. 25 E. of W. M. (Same conditions as in Ex. 42.)

## 35.

Real Estate mortgage given by Washington Irrigation and Fruit Co. to Oregon and Washington Trust Co. to secure payment of \$1,000,000 dated March 15, 1911. The following described tracts, or parcels of land lying and being in the County of Grant, State of Washington, and particularly described as follows, to-wit:

All its pumping plant, irrigation works, ditches, laterals franchises, machinery, power contracts,

water contracts, prospects Townsite of Wahluke and all the company's property of all kinds & description now located in Grant County, Washington, except Sec. 16 & 20 in Township 14 N. range 26 east, W. M. given as a special security to secure all bonds of Columbia River Orchard Co., up to \$1000,000.00 to be held in trust for the benefit of all bond owners, according to the terms of one trust agreement mentioned in said bond. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging.

This conveyance is intended as a mortgage to secure the payment of all bond of Columbia River Orchard Co.

(Signatures and acknowledgement.)

(Formal parts omitted)

36.

Promissory note given Sept. 30, 1911, by Washington Orchard Irrigation and Fruit Company to Columbia River Orchard Co. and endorsed over to Oregon & Washington Trust Co. for \$5,750,000.00

Mortgage given by Washington Orchard, Irrigation and Fruit Co. to secure the same dated Sept. 30, 1911, covering as follows. Two hundred acres of land at Wahluke, Grant County, Washington, more particularly described as the S.  $W\frac{1}{4}$  of N.  $W.\frac{1}{4}$  and the  $E\frac{1}{2}$  of the  $SW\frac{1}{4}$  and the  $SW\frac{1}{4}$  of the  $SE\frac{1}{4}$  of Section 10, township 14 north of range 26 east, W. M., together with any and all other property, real, personal or mixed, of any kind, nature

or description which is now or may hereafter become the property of the party of the first part.

This conveyance is intended as a mortgage to secure the payment of obligations up to the sum of five million seven hundred and fifty thousand dollars and these presents shall be void if such obligations be paid.

Provided however that any or all of the above property may be released from the lien of this instrument by the payment, unto the party of the second part, of bonds of the Columbia River Orchard Company at their par or face value of an amount equal to the reasonable value of the property so to be released. The amount of bonds which must be turned over to the party of the second part before release is made of the above described real property shall be \$60,000.00 face value, and for each acre of water right so released, there shall be \$100.00 face value of the above described bonds deposited with the second party.

It is further understood that the party of the first part intends in the future to construct irrigation canals, pumping stations and other works necessary or useful in connection with the operation and maintenance of a water system irrigating additional land under said Wahluke irrigation project, and when so completed to sell same to the Columbia River Water Company and accept in payment for such values bonds of the Columbia River Orchard Company.

Signatures and acknowledgement.

(Not recorded)

For valuable consideration the Columbia River Orchard Company, party of the second part, in the above mortgage, hereby sells, assigns, transfers and sets over unto the Oregon and Washington Trust Company all its right, title and interests in and to the said mortgage.

Dated this thirtieth day of September, nineteen hundred eleven.

Columbia River Orchard Company by W. E. DeLarm, President.

R. H. MacWhorter, Secretary.

Affidavit to foregoing mortgage dated Sept. 13, 1911 same form as Ex. 12

37.

Extract from Journal Oregon & Washington Trust Co.

List of Water Mortgages.

W. B. Weber.....	16,000
Jennie C. Koppen.....	16,000
Elizabeth Montgomery.....	16,000
Amuel Cords.....	16,000
A. Ganier & wife.....	16,000
Jennie C. Koppen.....	16,000
Adolph Lindauer .....	16,000
Mrs. Mary Tucker.....	16,000
Geo. Holtzmer.....	16,000
Nelson Litchfield.....	16,000
John L. Rydberg.....	8,000

W. A. Joyce.....	16,000
Mary A. Domay .....	20,000
William E. Stickle.....	16,000
Virgil A. Robertson.....	16,000
F. C. Koppen.....	16,000
Laura Wattle.....	16,000
James Perry.....	8,000
James L. Markley.....	16,000
G. J. Heyver.....	16,000
Geo. Holtzner.....	16,000
F. J. Hipp.....	16,000
C. J. Sullivan.....	16,000
Tobias Skaar.....	16,000

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\$372,000

### Sales Contracts.

A list of 57 showing \$239,465.00 due thereon.

### Real Estate Mortgages.

#### Washington

W. O. I. & F. Co	1,000,000.00		
W. O. I. & F. Co.	5,000,000.00		
Dec. 1.	Bonds issued	Hodges	1,000,000
			250,000
			500,000
		Biehl	250,000 1,000,000

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### 38.

Letter George C. Hodges to DeLarm & Biehl Co., dated at Portland, Oregon, March 6, 1911.

Mr. DeLarm asks me to give him the name of the



securities that is the mortgages on the desert land, that I hold as trustee for the Columbia River Bond.

The following is the list of the names: James Henry, Mary Domay, Jennie Koppen, Elizabeth Montgomery, William E. Stei, W. E. Weber.

39.

Letter Jack dated Thursday October 26, 1911:

Just reced. wire as follows:

“Any liens outstanding against Series B bonds 2202 to 2221 Columbia River Orchard Co., Is this series first closed and only lien against securities under trust agreement.”

K. E. Kaufman

215 Montague St., Brooklyn, N. Y.

What does series B mean? I answered as follows:

Bonds referred to first lien against securities under trust agreement.”

Looks like some one is getting busy. Braze!! turned over all securities this A. M. Would not wait any longer. Would appreciate a name of Seattle director for Trust Company, as I wish to elect new directors (3) It is important for several reasons.

Have an interview with Brown's kickers here in the slate. Will endeavor to educate them if possible.

40.

Land and water contract. Form of. The essential elements of this form are: 1. The company agrees to sell to the purchaser the following real property

situate in the County of Grant and State of Washington, to-wit:

(Blank for description) 2. Provides for installation of irrigation plant. 3. Provides for delivery of water. 4. Provides for payment for water. 5. Agreement to operate plant. 6. Additional provision for future payments and that the same shall run with the land. 7. Provides for use of water. 8. Provides for measuring water and shutting it off for repairs. 9. Provides for enlarging and building new ditches on the land. 10. Additional provision for covenant running with the land. 11. Provides against waste of water. 12. Provides for lien on land for use of water. 13. Provides for the payment for the land. 14. Provides for paying taxes on land. 15. Provides for improvements remaining on land until land is paid for. 16. Provides remedies in case of default in payments. 17. Provides for foreclosure of lien. 18. Provides for serving notice of foreclosure. 19. Provides whole contract to be assigned or none. 20. *Sall* bind heirs, successors and assigns.

Signatures and acknowledgement.

41.

Not introduced.

42.

Mary A. Domay mortgage to The Columbia River Orchards Co., dated June 1, 1910, covering the SW $\frac{1}{4}$  of NE $\frac{1}{4}$  sec. 10 twp. 14 N R. 26 E. W. M. and SE $\frac{1}{4}$  of NW $\frac{1}{4}$ , E $\frac{1}{2}$  of SW $\frac{1}{4}$  said Sec. 10.

Conditioned (Reciting the building of the irrigating project) which work is to be completed on or before the 1st day of April, 1912.

(Long recitals in regard to furnishing water.)

In the event that the said party of the second part (the company) shall not complete the covenants contained herein, then, at the option of said first part (Mary A. Domay) this mortgage to be void.

Signature of parties.

Not acknowledged.

Accompanied by note for \$4000.00 dated June 1, 1910, due April 1, 1912, and note for \$16000 dated June 1, 1911, unsigned and several assignments of same the last to the Oregon & Washington Trust Co. and affidavit of W. E. DeLarm that it is "a good, valid and solvent securities."

43.

Assignment of Emil F. Cords mortgage dated June 10, 1910 to Columbia River Orchard Co. May 1, 1910.

44.

Assignment of Cords mortgage to Washington Trust Co., Aug. 19, 1910.

45.

Assignment of Alfred Gagner mortgage Aug. 10, 1910 to Columbia River Orchard Co.

46.

Assignment of Gagner mortgage to Washington Trust Co., Aug. 19, 1910.

47.

Affidavit accompanying Jennie C. Koppen duplicate mortgage same form as Ex. 12,

48.

Assignment of L. Wattle mortgage to Columbia River Orchard Co. May 7, 1910.

49.

Assignment Laura Wattle mortgage to Washington Trust Co. May 7, 1910.

50.

Meeting of the stockholders of the Washington Orchard Irrigation and Fruit Company, held January 28, 1911.

All the voting stock of the corporation was present in the person of the holders thereof. The following resolution was unanimously adopted:

Whereas the Columbia River Orchard Co., a corporation did as a method of financing the project issue and circulate bonds under a scheme or plan whereby the issue thereof was progressive and based upon the deposit with a trust company of securities worth one hundred and twenty-five dollars for each one hundred dollars in bonds issued.

And whereas a number of such bonds have been issued and the payment thereof assumed by this corporation; and whereas it is to the best interests of this corporation to continue the policy of the Columbia River Orchard Company and to continue the issue of said bonds (all of the stock of said corporation being owned by this corporation) instead of is-

suing the bonds of this corporation, thereby saving the expenses in preparing such bonds issue and establishing a market therefor.

Now Therefore be it resolved that the directors of this corporation be and they are hereby authorized to purchase from the Columbia River Orchard Co. such of its bonds as may be required by the Corporation paying for the same in sales contracts, water mortgages or other good and valuable securities of the company, and

Be it further resolved that to assist in the marketing of said bonds and to expedite the sale thereof, that this corporation guarantee the payment of the principal and interest thereof and the president and secretary of this corporation are hereby authorized and directed to execute with the Columbia River Orchard Co. any and all agreements necessary to carry out this resolution and execute, acknowledge and deliver all necessary deeds, sales contracts, bonds, mortgages or any instruments where the name and seal of the corporation is to be affixed. And

Be it further resolved that the officers of this corporation be directed and authorized to enter into an agreement with some reputable trust company to act as trustee for the bond issue hereinbefore referred to and to make and deliver to said trustee company all necessary deeds of trust to secure the same and to deposit with said trust company deeds mortgages, sales contracts or other good and suf-



ficient collateral to secure said bonds and provide a sinking fund for their retirement.

## 51.

Meeting of the Board of Directors of the Washington Orchard Irrigation and Fruit Company held January 28, 1911. There were present Mr. George A. Custer, Mr. R. H. MacWhorter, Mr. W. E. DeLarm, Mr. A. J. Biehl, Mr. J. C. Muirhead, Mr. John E. Godfrey. W. E. DeLarm elected president and A. J. Biehl, Secretary-treasurer.

The president announced that arrangement had been made with the Oregon & Washington Trust Co. of Portland, Oregon, to act as trustee for the bond issue authorized by the board of stockholders and upon motion such selection was approved.

The president and secretary were authorized to execute and deliver a trust agreement with said company and were further authorized and directed upon the receipt of the company by the company of bonds of the Columbia River Orchard Co. to execute a guarantee of the payment of the principal and interest thereof.

## 52.

Petition in bankruptcy filed in the District Court of the United States for the Western District of Washington, Northern Division. In the matter of Columbia River Orchard Co., a corporation, alleged bankrupt, Filed March 13, 1912, by A. C. Gum, creditor, indebtedness \$341.90, R. H. MacWhorter, creditor, indebtedness \$340.00 and Harry Brown, cred-

itor, indebtedness \$200.00. Petition is in the usual *for* for involuntary bankruptcy. Subpoena shows service March 15, 1912, and admission of insolvency filed Mar. 16, 1912, by the company signed as such by R. H. MacWhorter Secretary and treasurer. Order declaring company bankrupt signed by C. H. Hanford, Judge, March 16, 1912.

## 53.

Petition for involuntary bankruptcy filed in the District Court of the United States for the Western District of Washington, Northern Division In the Matter of Washington Orchard Irrigation and Fruit Co. a corporation, by Standard Oil Co., creditor, indebtedness \$121.47; A. C. Gum, creditor, indebtedness \$840.50; Scott I. Wallace, creditor, indebtedness \$1240. Petition in usual form filed Feb. 5, 1912 Admission of insolvency filed Feb. 5, 1912, signed Washington Orchard Irrigation & Trust Co. by R. H. MacWhorter secretary & Treasurer. Order adjudicating the company bankrupt signed February 5, 1912.

## 54.

Certified copy of the proceedings in the Superior Court of the State of Washington for Grant County, Puget Sound Bridge & Dredging Company, a corporation, plaintiff, vs. Columbia River Orchards Company, a corporation, Kilbourne & Clark Company, a corporation, and U. Edwards, Defendants. Complaint recites contract between Columbia River Orchards Co. and Kilbourne & Clark Co. and the sub-

contract between Kilbourne & Clark and the plaintiff, and the building of the pumping plant by plaintiff, that the value of the labor performed unpaid is \$22,482.67; that on the 23rd day of Sept. 1910 plaintiff duly gave notice of claim for lien and recorded same on Sept. 26, 1910 claiming a lien on the pumping plant, machinery, ditches, canals, etc. Prayer for judgment \$22,482.67 with interest at 6 per cent from July 5, 1910 and for lien on the property and decree foreclosing the same and for \$1500.00 attorney fees.

Certified copy of summons and return showing service. Certified copy of document filed in case reading: "It is agreed and admitted on behalf of the defendant Kilbourne & Clark Company a corporation that the amount justly due on the claim of plaintiff in this action to the 26th day of January, 1912, is \$22,059.40. Dated Jan. 25, 1912 Kilbourne & Clark Company by C. A. Kilbourne President. Filed Jan. 26, 1912, and also a certified copy of a stipulation to the same effect by the Columbia River Orchard Company signed by W. E. DeLarm, President.

Judgment entered Jan. 26, 1912, for the sum of \$22,059.40 and decree foreclosing lien and order of sale of the property.

55.

Certified copy of contract between J. M. Friel & wife A. L. Maltbie & wife, S. A. Pearl and wife and others and The Columbia River Orchard Company,

dated May 23, 1910, for the sale by first parties to second parties of section 20 township 14 N. R. 26 E. W. M. in Grant County, Washington for the sum of \$64,000 to be all paid within 20 months after date, Recorded in Volume 2, page 481, Land Contract Records of Grant County, Washington.

## 56.

Certified copy of Land contract between E. E. Davis & wife and A. L. Maltbie and Silas Pearl, dated April 2, 1910, agreeing to sell 1-3 interest in Sec. 20, twp. 14, N. 26 E. W. M. for the sum of \$7455.00 to Maltbie and Pearl, all to be paid by April 1, 1912.

## 57.

Certified copies Claim in regular form of Oregon & Washington Trust Company filed in the Matter of Washington Orchard Irrigation and Fruit Co., a bankrupt, in U. S. Dist. Court at Seattle. Sets out mortgage Ex. 35, and filed April 29, 1912, with John P. Hoyt, referee in bankruptcy; filed with the clerk Jan. 6, 1913; Objections to claim filed by Louis P. Sichler by his attorneys McClure & McClure to which is attached as an Exhibit the trust agreement (Ex. 25 herein) Filed May 7, 1912, with referee, and with the clerk Jan. 6, 1912, as follows:

It is ordered that said mortgage be and the same is hereby adjudged to be invalid and not a lien upon the property therein described or any portion thereof or upon the property of the bankrupt or any portion thereof.



58.

Portland, Oregon, March 27, 1911.

Washington Orchard Irrigation & Fruit Co., 227 Henry Building, City. Gentlemen: Enclosed please find our receipt in full payment for the pumping outfit for which you contracted with us to build on the Columbia River at Indian Corral, near Wahluke. We desire at this time to thank you most sincerely for your very courteous and generous treatment of our company. We are also enclosing the contract on our part to install the second unit at such time as you may require same. We feel that you will have the finest pumping plant on the Columbia River. You have not stinted us in any way and have allowed us to put in the best of material and workmanship and as good apparatus as can be purchased. This present plant will give you a capacity of 10,000 gallons per minute at low water, and about 25. per cent increase over this amount during the high water period when you will do most of your pumping. The second unit which we stand ready to install at any time upon three months notice will be an exact duplicate of the present unit. Again thanking you, we are, Very sincerely yours, Kilbourne & Clark Company, E. C. Kilbourne, Manager.

59.

Letter dated Seattle, Wash., Sept. 9, 1911, to Mr. R. S. Chapman by W. E. DeLarm. Story of Wahluke, giving a long history of the project among which are the following extracts:



Among the passengers who went on a Sunday excursion, the fall of 1907, on the old steamer Todd, from Peace to Priest Rapids, were George W. Armstrong, from Spokane, a promoter, ex-politician and all round good fellow, and H. H. Humphrey, a practicing attorney of Kennewick. Neither had money, eastern connections or influence but what they lacked in these they made up in nerve and inexperience. On the 23rd of December of the same year, held a meeting in the office of Mr. Humphrey, in Kennewick, and with the assistance of three accommodating friends, organized what they called the Columbia River Orchards Company. This company was regularly incorporated under the laws of the State of Washington on January 28, 1908, with an authorized capital stock of one hundred thousand dollars. Their plan was to raise, by selling stock of the company sufficient funds to water several sections of this land.

During the winter of 1908 another trip was made up the river, to secure, if possible, land under the proposed canal in exchange for stock of the company. Mr. F. C. Koppen, the Postmaster at Wahluke and one of the leading citizens of that section, was induced to deed the company eighty acres of land in consideration of eight thousand dollars par value of the company's stock and being made president of the corporation.

With this holding of real property and two desert land mortgages on 160 acres of land each, the com-

pany began actual construction work on the project. A townsite was laid out, two lots sold to local boosters for three hundred dollars each, and an eight room hotel built. A well was dug, striking water at sixty-two feet, and a large storage tank holding thirty thousand gallons erected; with the addition of a seven horsepower gasoline engine and a small pump the irrigation system was begun. It soon was found that the capital stock of the company was far too small to accomplish much, especially when so little actual cash was realized from the sales. It was decided to form a new company with a larger capital stock. On the second day of January, 1909 this new company was incorporated for five hundred thousand dollars under the name of The Columbia River Orchard Company. A fresh supply of stock certificates now being available, stock selling began in earnest. Ranchers, clerks, railroad men, everyone who could be made to do so, contributed toward keeping up the traveling expenses and hotel bills of the salesmen. About twelve thousand dollars of actual cash and a large collection of non-negotiable paper was realized. A contract was let in the following fall, to Uriah Edwards for the construction of ten miles of main canal at an agreed price of twenty cents per cubic yard, one third payable in cash and two thirds in stock of the company. Owing to the absolute inexperience of Edwards, what little work he accomplished was useless outside of the clearings of the right of way for the canal.

In the early part of January, 1910 the project was taken under option by the firm of DeLarm and Biehl, of Seattle. Early in March steps were at once taken to begin construction work in earnest, and under competent plans and direction. A contract was entered into with Kilbourne and Clarke of Seattle, for the construction of a thoroughly modern reinforced concrete pump house of the latest and most efficient design, and the installation of the best obtainable pumping machinery electrically driven and directly connected to the meters. As the demands for funds were insistent during this construction period, and the securing of rights of way delayed, it became necessary to provide some intermediate means of raising necessary capital until the proposed bond issue could be realized upon. To tide over this interim a bond issue of \$62,000.00 was authorized to be taken out through the first company (Columbia River Orchards Company) assigning desert land mortgages to this company amounting to \$125.00 for each \$100.00 of bonds issued. This company was made a holding company and had no liabilities other than those bonds and the interest on the same. All of the first company's stock belonged to the second company, and was by that company returned to the treasury of the first company with the exception of five shares. This eliminated all stock liability except the five shares necessary for the trustee. Of this bond issue \$59,000.00 was issued and certified to by the Washington Trust &

Savings Bank of Seattle, who were appointed trustees. These bonds were realized upon by being exchanged for clear city property, a mortgage being placed on the property and the proceeds used to defray the construction expenses. The equities and more bonds were then exchanged for more clear property and the process repeated. In this *was* about fifty per cent of the face value of the bonds was secured in either cash or commodities which applied directly on the construction work. For instance—in many cases property could be exchanged directly for lumber, cement, etc., and the other fifty per cent of the face value of the bonds retained by the company in the form of real estate equities. It also was found that a considerable number of the holders of the bonds would exchange them for acreage under the project, and in this way another desired result was accomplished—the securing of actual settlers on the land. Jan. 1911 a contract was let to J. H. Fox of Spokane, to do \$20,000.00 worth of ditch construction for cost, plus 10%. A competent engineering crew was secured and actual work again begun. In about two months this money was used up and an additional contract for the same amount made. Later it was found necessary to increase it by another similar sum, making the actual cost of the ditch over sixty thousand dollars, exclusive of the engineering charges. When the latter was finally completed the pumping plant represented an outlay of more than \$115,000.00. An auxiliary



power plant was installed. The contract for this was let to Gray and Barish of Seattle for about \$7,500.00. This brought the complete cost of pumping station, canals, rights of way and engineering up to over \$300,000.00 with a replacement valuation of approximately \$250,000.00. Early in January 1911, it was thought best to issue additional bonds to secure funds to defray these added expenses and acquire acreage under the project. It was also decided to organize a new company to buy the project from the Columbia River Orchards Company in order that everything might be entirely right and clean for the extra issue of bonds—these bonds to be guaranteed by the new company. Accordingly the Washington Orchard Irrigation and Fruit Co. was incorporated under South Dakota Laws for \$1,500,000.00 preferred and common stock. Of this amount \$400,000.00 was preferred and \$1,100,000.00 common. Three hundred thousand of the preferred was given to the Columbia River Orchards Company for their interest in the irrigation project, and the common was given to DeLarm and Biehl for their holdings and the additional monies they had advanced. Upwards of five hundred thousand dollars worth of bonds were issued under date of February 1, 1911, bearing seven per cent interest, and exchanged for property which was used as previously explained. The company issued these bonds through the first company organized viz., The Columbia River Orchards Company. As the company exchanged these



bonds both ways, either giving them for property or taking them in exchange for property, it was thought best to issue the bonds under three dates, February 1st, June 1st and October 1st. When February bonds were taken in exchange for Company property June bonds were put out next time and February bonds of an equal amount cancelled. This waved paying interest on that amount of bonds for four months. In a like manner June bonds were to be taken up and October bonds put out instead. If sufficient exchanges both ways could be effected, practically but little interest need be paid out.

Again—the Company accepted bonds or property as first payment on acreage under the project, and in this way retired some bonds, retiring others by exchanging the properties received for acreage for more bonds, thus reducing the issue by that much. This plan worked out admirably until several firms of brokers determined, for their own profit and without reference to the welfare of the company or even the truth of the statements they made regarding it, to break the market. As the trading in these bonds was very active, large amounts of them got into the hands of brokers who received them in payment of commissions. These they could afford to do and would sell for less than par, and using this as a leverage, and by constant pounding the market was broken until the bonds could be purchased around ten cents on the dollar for cash, although they still were taken in trade around fifty The company

could not afford to let their bonds go at anywhere near this price, and the only way of still getting results as first outlined was by making exchanges at distant points for bonds at par and exchanging them for bonds at home at the market price. In August, 1911, a separate water company was formed so as to entirely separate the canals, pumping plant and water system from the land and bond department of the business. To this company was sold the irrigation system—canals, pump house and accessories for \$250,000.00. The present standing of this company, the Columbia River Water Company is summed up in the following statement:

#### Financial Statement.

##### Assets:

Pump house, canals, laterals and distributing system as now already installed including steam power plant.....	\$250,000.00
Open account "Bills Receivable" of Washington Orchard Irrigation & Fruit Company, payable in 90 days.....	25,000.00
Two additional pumps and attachments which are to be installed within one year by Kilbourne & Clark Company at no additional cost to the Company.....	10,000.00
	<hr/>
	\$285,000.00

## Liabilities:

Capital stock.....	\$250,000.00	
Balance due on construc-		
tion.....	25,000.00	
Surplus. . . . .	10,000.00	
	<hr/>	<hr/>
	\$285,000.00	\$285,000.00

The sale of the pumping plant, canal and distributing system of the Washington Orchard Irrigation and Fruit Company to the Columbia River Water Company, was so conducted that no liabilities of any nature of the former company were transferred to the present corporation, with the exception of the \$25,000.00 mentioned in the financial statement. This you also will note is offset by the bills receivable account of \$25,000.00 and when this is met, will leave the property of the company entirely free from debt.

**Organization.**

The company is a Washington corporation with a paid up capitalization of two hundred fifty thousand dollars. There is no indebtedness against the corporation other than is shown, and it is the purpose of the company to secure a bond issue along the lines hereinafter designated.

**Ownership.**

The Columbia River Water Company is a close corporation, the stock all being held by five persons. Coupled with the ownership of this company, is *als* the control of the Washington Orchard Irrigation

and Fruit Company, which owns and controls the land department and the water mortgages on lands under this project, thus insuring perfect cooperation.

60.

Affidavit of DeLarm to Mrs. Koppen mortgage same form as Ex. 12.

61.

Letter Hodges to DeLarm & Biehl dated Portland, Oregon, June 19, 1911. Regarding the Minchot property in my conversation with you over the phone before the *Michot* deal was made, you said you had \$700 mortgage and the \$100 mortgage, and I agreed to take over this property, including this mortgage at this price. You know the state of my finances at the present. It will be impossible for me to take care of this at present, so guess you will have to take care of it for me now and let me have the property when the mortgage is paid.

62.

Statement of Columbia River Orchard Company.

The Columbia River Orchard Company is a Washington corporation with a capital stock of \$100,000.00 which has been fully paid in mortgages on farms, and the stock is now owned and held by the Washington Orchard Irrigation and Fruit Company. The Company is essentially a holding company and incurs no liabilities other than the issuance of bonds. There has been authorized a bond issue which is pro-

gressive and is limited in amount to securities amounting to 125 per cent for every \$100 of bonds issued. At present there has been \$104,000.00 of bonds issued.

Assets:

Mortgages. . . . . \$188,000.00

Liabilities:

Bonds issued. . . . . \$104,000.00

Accrued interest . . . . . 1,180.00

Taxes. . . . . 17.50      105,197.50

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Surplus. . . . . \$ 72,802.50

The mortgages mentioned above are on farm lands at \$1000.00 per acre, which land is selling for \$350.00 per acre and there are no other mortgages on the above property. In addition to the above security the principal and interest on the bonds of this company is guaranteed by the Washington Orchard Irrigation and Fruit Company.

Seattle, Washington, February 15th, 1911.

Attest A. J. Biehl, Secretary.

63.

Statement to the Fidelity and Deposit Company of Maryland, Baltimore, Maryland, by Washington Orchard Irrigation and Fruit Co.

Incorporated 1911.

Cash on hand . . . . . \$ 3,250

Cash in stocks, bonds &c Mkt value. . . . . 150,000

Real estate and where located (Give location and description of each piece)



1. About 1400 acres under water in Grant Co., Wash., \$3.50 .....	490,000
1-3 sold at above price	
Farm and city property about .....	50000
Irrigation project .....	500000
Plant consisting of	
Pumping plant all paid .....	160000
Irrigation works .....	50000
Townsite Wahluke .....	40000
Stock of Supplies	
Notes Receivable from sale land .....	150000
Accounts " .....	8000
Other assets and nature thereof	
Total assets .....	1,601,250
Capital stock .....	1,500,000
Bonds	
Borrowed or due on Real estate	57,500 Long time
Being balance due on purchase price on 11.20 acres & town-site	..
Incumbrance on plant .....	none
Notes payable .....	2,000
Accounts payable construct about	6,000
Other liabilities and nature thereof	
Sundry small accounts .....	500
<hr/>	
Total Liabilities .....	1,566,000

Amount of liability as endorser or surety for others, \$400,000 bond issue guaranteed and protected

with \$125 of notes and water contracts for every \$100 of bonds.

Amount of Employer's liability insurance carried

.....

List of contracts completed. Installing irrigation works to water 17,000 acres, which will be completed in about 30 days and all paid but about \$20,000.

The above statement is made for the purpose of inducing the Fidelity and Deposit Company of Maryland to execute a bond on behalf of Pacific Light & Power Co., in the penalty of \$15,000 application for which bond was dated Mar. 11, 1910, and I hereby declare that the above is a true statement of its financial condition without any mental reservation whatever, and also that it has never defaulted on a contract, and that no one has ever been obliged to pay a loss on account of having become its surety.

W. E. DeLARM, A. J. BIEHL, President Secretary.

Sworn before me this 11th day of March, A. D. 1911.

JOSEPH R. ANDERSON, Notary Public.

References

Kilbourne & Clark Co. Engineers, Seattle.

Jos. R. Anderson, Attorney, Seattle.

64.

Brief summary of irrigation project of the Columbia River Orchards Co.

Lying under project .....17,740 acres  
of which 8540 is R. R. land..... 8,540

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Leaving ..... 8,200 acres  
Under entry.

On basis of \$100.00 per acre for water, this will when sold, amount to \$920,000.00. Of the above \$184,000.00 have been signed and delivered. 160 acres is State land yet unsold.

1120 acres has been purchased by the Company on contract. Of the above land taken by entry, 2880 acres is deeded or final proof now being made. This is exclusive of the 1120 acres purchased by the Company, which also is deeded or school land purchased from the state. Making a total of 4,000 acres which is held in fee simple.

11 sales contracts closed for 150 acres of land, or an average of \$300.00 per acre. Balance due on contracts with notes attached \$14,947.00.

#### Recapitulation.

Water contracts signed .....	184,000.00
1120 acres of land at \$200.00 an acre .....	204,000.00
Townsite ....., .....	50,000.00
Pumping plant and ditch .....	70,000.00
Launch .....	2,500.00
Tools and equipment .....	4,000.00
Engineering work .....	5,000.00
	<hr/>
	\$539,500.00

## Liabilities

Balance due on land contracts .....	78,000.00
Balance due on pumping plant and ditch .	40,000.00
Notes payable .....	3,118.00
Open accounts .....	1,300.00
	<hr/>
	122,418.00
8080 unsigned water rights .....	808,000.00
	<hr/>
	\$1,225,082.00
less cost to complete project .....	100,000.00
	<hr/>
	\$1,125,082.00

This does not include 8540 acres of R. R. land for which practically all the expense for furnishing water has been met in the above.

THE COLUMBIA RIVER ORCHARDS CO.

W. E. DeLARM, Pres.

A. J. BIEHL, V-Pres. & Secy.

Seal

65.

Statement of financial condition of Washington Orchard Irrigation and fruit Company. The company is putting water on about 17,000 acres of land lying along the Columbia River in Grant County, Wash., which mostly comes under a sixty foot lift. This pumping plant is considered by engineers the finest in the country and is practically completed, and is fully paid for, including additional units which will be needed next year.

The ditch work is under contract and there will be nine miles of same completed in fifteen days, and is paid for with the exception of about twelve thousand dollars. This practically makes the entire system fully paid. Owing to the changing daily of the company's condition a financial statement can only be given which is approximately exact, but covers all the essential conditions.

Assets:

Real estate in Seattle and other parts of the state not under the company's project .....	\$ 200,000.00
Real estate under the company's project .....	200,000.00
Water rights in for 10,000 acres at \$100 .....	1,000,000.00
Supplies on hand .....	3,000.00
Stock in other corporations .....	303,000.00
Two naphtha launches, .....	5,000.00
Treasury stock .....	100,000.00

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Total assets about .....\$2,061,000.00

Liabilities

Capital stock .....	\$1,500,000.00
Bills payable .....	8,750.00
Forward            Assets, .....	\$2,061,000.00

Liabilities

Forward .....	\$1,508,750.00
Due contractor .....	12,000.00
Balance unpaid on real estate .....	28,000.00
Liabilities about .....	1,548,750.00

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Approximate surplus of assets over liabilities ..... \$512,250.00



There are a few current assets and liabilities which are not included herewith as one practically balance the other.

## WASHINGTON ORCHARD IRRIGATION AND FRUIT CO.

A. J. BIEHL, Secy.

66.

Letter dated April 8th, 1911 to J. H. Fox, Spokane, Wash., by Washington Orchard Irrigation and Fruit Co. by W. E. DeLarm, Pres. submitting proposition for \$20,000 worth of work on ditches in addition to the contract of Jan. 3, 1911 for \$20,000 worth of work on canals and ditches.

We agree to pay for such work as is done over and above the first \$20,000 called for in the contract in our letter of January 3rd, as follows: \$3,000 May 1st; \$5,000 May 15th; \$5,000 on the 15th of each month thereafter until paid.

67.

Meeting of stockholders of the Washington Orchard Irrigation and Fruit Company Held August 9, 1911.

The following resolution was presented, read and upon motion unanimously adopted: Resolved that the Board of Directors of this corporation or its executive committee be, and the same are hereby authorized to offer for sale the irrigation system of this company, consisting of said pumping plant and ditch and to sell the same for the sum of not less than \$250,000 payable in cash or in bonds guaranteed by

this corporation provided that the purchaser thereof enter into a contract with this company to deliver water without further cost to three thousand acres of the company's land upon the payment of the same maintenance fee charged by the company on the lands heretofore sold by it and the president and secretary are further authorized as part of said transaction to turn over to such purchaser all of the water mortgages owned by the corporation covering land situated on the level of lands irrigable by the present ditch within such time as the company can safely do so after protecting itself on the reservation of water rights for three thousand acres.

W. E. DeLARM, President.

A. J. BIEHL, Secretary.

68.

Contract between W. E. DeLarm and R. S. Chapman whereby Chapman *undertood* to negotiate the bonds of the Columbia River Water Co. to the amount of \$2,500,000 and providing compensation therefor \$5000 in cash and \$20,000 par value of stock of company and also provides for purchase of lands of Northern Pacific Co. by Chapman at a commission of \$1.00 per acre, dated at Seattle, Washington, September 9, 1911.

69.

Letter dated Tacoma, Wash., 2-25-1911 to C. C. Hodges, Portland, Ore. By R. H. MacWhorter. We have a woman here who owns a bungalow in Portland and who wants to trade it for Tacoma property.

Have a deal on with a Miss Hamilton here for her place which she holds at \$7,000.00 and as it is for Columbia bonds, she will either write or go to Portland to see the Oregon & Washington Trust Co. about them. I have tried to get her to write as I do not know whether you have the new name on the door and a trust company on the ninth floor might not make as good an impression as a letter. However, I know that should she take a trip down there you can persuade her that the bonds are worth more than par. I have not told her that you were identified with the trust company and do not know whether or not she is acquainted with you. Things really begin to look like we might do some business here soon. With kind regards to Mr. Humphrey.

## 70.

Letter dated Portland, Oregon, Mar. 4, 1911 to Standard Investment Company, Seattle Wash. by Oregon & Washington Trust Co. by H. H. Humphrey V. P. Letter identical with Ex. 23.

## 71.

Letter dated Portland, Oregon, April 28, 1911 to Mrs. Bell Nickell, Jacksonville, Oregon, by Oregon & Washington Trust Co. by H. H. Humphrey. Identical statements as in No. 23. We understand the company is now practically out of debt with the exception of the bond issue. The bonds are issued upon the amount of the collateral the company is able to put behind each bond. We also understand, on good authority, that the company has one of the finest

propositions in Washington, and that the men behind it are well able to carry it on successfully.

## 72.

Letter dated Portland, Oregon to DeLarm & Biehl by Geo. C. Hodges. In looking over the bonds and securities sent me the other day I note there are 16 bonds for \$100 each. I suppose this was meant for the amount due to the Oregon and Washington Trust Co. We also received the mortgages for \$75,000 that is to secure the bonds. We have two or three new things on today that look very good and we are trying our very best to force something that will get us some more funds for we are certainly in need of them. I have been trying all day to get hold of that Missouri man but have not succeeded yet. Mr. Humphrey has some new things on today in the course of time. The money did not come this morning for the rent and other expenses and we must have that quick.

## 73.

Letter dated Portland, Oregon to DeLarm & Biehl by Geo. C. Hodges. On looking over the bonds more carefully and separating each one I find there are 17 bonds so you do not have to come through with the other bond.

## 74.

Letter dated Portland, Oregon, February 5, 1911 to DeLarm & Biehl by Geo. C. Hodges. It is a very serious matter with us, with Hartman & Thompson calling on the phone about every few minutes for that



check you promised absolutely to wire, and the building people threatening to put us out into the street, because we did not pay our rent, and Hartman & Thompson people are downstairs, in the same building and are sure to get together with the rent people, as soon as they do then, we all go through. We must have the trust agreement you promised that you would send us last week, now this is absolutely important and you can send it, and you must do it. You told me that the Washington Trust Company would send down those securities, and their trust agreement, but I have not seen or heard anything from you since the phone message last Friday evening. We are certainly in dire straights and need help. Please send us some succor. If we do not have it at once, we will all be turned out in the street.

75.

Letter dated Portland, Ore., Aug. 23, 1911 to R. H. MacWhorter, Seattle, Wash by Oregon & Washington Trust Co by A. J. Biehl, Pres. As trust officer of this company you will please certify Columbia River Orchard Company Series A, June issue bonds to the amount of Two Hundred Eight thousand dollars, securities to the amount of 125 per cent of that amount having been delivered to us.

76.

April 25, 1911.

This agreement entered into by and between John Stephens of Seattle, Washington, and A. J. Biehl, of Seattle, Wash. Said John Stephens agrees to



loan \$800.00 to the said A. H. Biehl at the rate of seven per cent interest, said loan being for a period of sixty days from this date and due June the 25th, 1911.

The Columbia River Orchards Company to turn over to said John Stephens the sum of ten thousand dollars Columbia River Orchards Co. bonds as security for said loan of Eight Hundred Dollars.

JOHN STEPHENS.

A. J. BIEHL.

April 24, 1911. Received on account \$100.00 and turned over \$2000 of C. R. O. Bonds.

A. J. BIEHL.

77.

Letter dated Seattle, U. S. A. May 3, 1911 to The Leanord Agency, Walla Walla, Wash. by DeLarm & Biehl. The bond issue which was gotten out by the Columbia River Orchards Company, is progressive and is secured by \$125, in mortgages on real estate behind each \$100 bond. The present amount of bonds issued is about \$400,000 and have brought par for all bonds which have been sold by the company. We consider them very good and they are fairly active in the Seattle market.

78.

Letter dated Tacoma, Oct. 4th, 1910 to Columbia River Orchards Co. by Geo. C. Hodges Sec. Puget Sound Realty Co., Seattle, Washington.

Mrs. Watkins came in very much exercised yesterday and wanted to know about the standing of your company, etc., and I tried to pacify her and finally

at last she showed me a letter that she had received from a man by the name of Nelson connected with some business chance concern in Seattle called the Northwestern or something like that, statement that they had a client, a Mr. So and So, and mentioning the name, who was in possession of Mrs. Watkins' contract and notes for \$2600 given to the Columbia River Orchards Company and that their client had loaned money to the Columbia River Orchards Company and had taken this in as security but they doubted if ever the Columbia River Orchards Co. could pay it so they would naturally look to Mrs. Watkins and they had asked Mrs. Watkins address but Mr. DeLarm said he didn't know the address and saying that they hoped that she would not mention this to anybody and so on and so forth. The letter was addressed to Mrs. Watkins in Tacoma and it came to another Mrs. Watkins before it came to her and was opened and read, so you see how much damage this has done. Now I realize the necessity for using these things as security in banks and in certain places because securities are negotiable but I can't see the policy of peddleing these things out to individuals and having individuals put it in the hands of business like this and then to write a letter of this kind to the purchaser. I think this whole thing is very, very bad business.

I was able to throw myself in the breach and show them the contracts for Mr. Taylor and myself taking ten acres just above them and assuring them that I

was going to have some more and finally got her and her sister to look at it in a little different way and to express a desire to go over and see and investigate for themselves so now she wants to go and I want her to go with either you or I and I can't get away so you must take her just as soon as you can possibly arrange it. I told her that you possibly would go Thursday. Now I don't think you had better make this later than Friday because it is important and needs immediate attention. Now answer this letter at once and make it so that I can show her the letter, but do it at once.

## 79.

Letter dated Tacoma, Oct. 6, 1910 to Columbia River Orchards Co. Seattle, Wash., by George C. Hodges. Things never looked brighter for immediate results than they do at this time and I am afraid to tell you of any particular case as there about a dozen on and a half dozen ready to close. We are especially anxious to help get that money ready so that you may take over that snap in the land, and believe me, when I say, we are letting nothing slip at this end of the line.

## 80.

Letter dated Tacoma, Oct. 8, 1910 to Columbia River Orchards Co. by Puget Sound Realty Co. by Geo. C. Hodges, Sec.-Treas.

The Puget Sound Realty Company has decided to take over the \$500 equity in the Carmichael house as there is no immediate chance of a settlement, and per-

haps you had rather have this thing closed up in this way as it is bound to come to a condemnation suit, so the commissioner of Public Works tells us to-day. So you can charge the Puget Sound Realty Company \$500 in commission against the Maxwell and Carmichael deals which is the amount of your equity and we will have the Notary fill in the deeds on this to-day.

## 81.

Letter dated Tacoma, Wash., Dec. 6, 1910 to Columbia River Orchards Co., by Geo. C. Hodges. We have received today six hundred dollars on the Williams house, and have disbursed it as follows (Statement showing disbursement of \$600 omitted.)

## 82.

Letter dated Portland, Or. 1-24-11 to Gentlemen by Geo. C. Hodges.

The check you gave me last Saturday came back no funds. I wired you today to send me a certified check so I can deposit it at once. I hope you did; if not do so at once send me check for \$68.00 the amount of the last check. I went to order the telephone to-day and they wanted \$15.00 in advance. I did not have the price so did not order the phone; \$5.00 for the year and two months in advance because you handle real estate; it is a rule they wont break for anybody, so you see the situation and how I am fixed.

## 83.

Letter dated Portland, Oregon, Jan. 27, 1911 to Mrs. F. D. Cooney, Ballard, Wash. by Oregon & Washington Trust Co. by Geo. C. Hodges, trustee.



Replying to your letter of the 26th inst., relative to bonds of the Columbia River Orchard Co. We investigated this project before we accepted the trusteeship of these bonds, and in our judgment it is safe from an investment standpoint. We held as trustee \$125.00 worth of first mortgages for each \$100 bond issued by this company, which makes the bond purchasers an investment guaranteed by the first mortgages which we held, and further these bonds are guaranteed by the Washington Orchard, Irrigation and Fruit Company. Under these conditions we consider the investment safe.

84.

Letter dated Portland, Oregon Feb. 9, 1911 to DeLarm & Biehl Seattle, by Geo. C. Hodges. I enclose a lot of worthless paper that is signed up and no good, and I am going to appoint a guardian for both of you so that you can not make such mistakes any more, for these things hurt your credit thousands of dollars and it refers to everybody that is connected with the firm. Now gentlemen for God's sake don't give any more checks unless you know the money is in the bank, and has not been checked out by the other one. I have a letter from John Reinboth, in which he tells me you gave him a check for \$75 and he found out it was no good. I suppose for the same reason the others were no good, and caused him no end of trouble, and consequently he feels very blue about the whole business just now.



## 85.

Letter dated Portland, Oregon, February 11, 1911, to DeLarm & Biehl, Seattle, Wash., by Geo. C. Hodges. I have one deal over today, and the abstracts in our hands to be examined, where we took in an equity at \$1500 on 100 acres of good timber that is said to cruise 5,000,000 or 6000,000 ft. There is a mortgage against this for about \$4,000 but we had to start something so this is the first thing we started, and we paid the equity in bonds, and we think we can turn the timber over immediately for a clear house and lot. We have two or three more deals that are waiting absolutely on the trust agreement. Now we have everything in fine shape down here, with the business coming up fine, if we had the where-with to do something with. I want that trust agreement and I want it bad, and I want some money to pay the rent down here, and my hotel bill and the office girl. I know that you are pretty hard pressed and we are worse than you and you must relieve this situation, and must not keep these people waiting here and I have refrained from writing as long as I could. I am going to stop writing very soon, and adopt your tactics, without ever writing anybody anything. I guess you think that is the best way to do, but I have never found it satisfactory, but I guess it is.

## 86.

Letter dated Portland, Oregon, Feb. 14, 1911 to DeLarm & Biehl by George C. Hodges. The water is

just up to our neck now, and if we do not get relief, we will have to go out with the flood, tomorrow. I mean by that, that we are asked to vacate the offices on the 15th of the month. The agent is very nice and said he did not want to put us out, and asked me as a gentleman, to either pay the rent tomorrow or to move out of the buildings without any trouble, and I promised I would do so unless there is something that comes through today or the first thing in the morning we will have to pack up and get out. This afternoon I received a letter from Mr. Biehl inclosing a copy of the trust agreement of the Washington Trust Company and \$5.00, there was a bill left this morning for \$4.65 and an express bill this afternoon for \$.55 so I am \$.20 worst off than I was this morning. I do not need to tell you I am living off of borrowed money now and have been for some time. The trust agreement that Mr. Biehl sent does us absolutely no good in the world, because the bonds that we have refer to the trust agreement and the lawyer wants to see the very trust agreement before he will advise his clients to accept the bonds. Mr. DeLarm told me on the phone Sat. night that the trust agreement would be sent the next day which was Sunday, that it was signed and already and I have not had it yet.

Now this might appear a little bit of a thing, but it has gotten to be a big thing down here, there are two or three deals pending on this and we cannot put them off much longer. We have lost the apart-

ment house deal now, at least the lady has gone to California, and will not be back for a couple of weeks, and they will all go by the way when we promise them every day and cannot deliver. We have a letter from a real estate man in Salem that says that the place is worth about \$25,000 and he can place about \$8,000 mortgage on it but he would not place \$10,000. What shall I do in regard to this matter.

## 87.

Letter dated Portland, Oregon, Feb. 15, 1911 to W. A. Burleigh by Geo. C. Hodges. (Same statement as in No. 83.

## 88.

Letter dated Portland, Oregon, Feb. 21, 1911 to DeLarm & Biehl by Geo. C. Hodges. Enclosed find the trust agreement, signed and returned as requested.

## 89.

Letter dated Portland, Or., Feb. 24, 1911 to C. H. Graves, Monroe, Wash., by Oregon & Washington Trust Co by Geo. C. Hodges, trustee. Same statements as in No. 83.

## 90.

Letter dated Portland, Or. Mar. 1, 1911 to DeLarm & Biehl by Geo. C. Hodges. Please send me at once about twenty bonds and also send some more securities to cover those bonds that we sent you. Now this is important because we must not be caught short of securities it would ruin us absolutely and the bank

examiner does have the right to examine trust companies and we will be about the first one that he will take up because we are the newest and there is beginning to be a lot of talk about us all favorable but talk nevertheless. We put over another deal for \$2000 *wort* of timber. We paid \$1200 for the timber and \$7000 for the mortgage that was on it and \$100 commission on the deal. The deed will be made out tomorrow morning and the people will sign up at eleven o'clock. I think the Tobey deal will go through like a top, they have brought down their abstracts thirteen in all and Mr. Humphrey is examining them. I think I got on to a *might* fine line yesterday afternoon, I will close a deal with a dunkard for ten acres of Wahluke land and taking in exchange his homestead of 160 acres *nor* far from Utopia for \$3000 and he assumes the balance and through this fellow I will get his father, his brother-in-law and two brothers, some of them for exchanges but nothing only clear property taken and some cash on the deals beside it will be a colony of dunkards on the Wahluke land and that will go on immediately and improve it and get a crop this year. Now I consider this mighty good business because they are a mighty nice class of people to get over there, and I may have to go up with them the last of the week and close up the other two deals at Pasco and go with them up to Wahluke because Brown & Kopin killed the Virginia man entirely but if you will write me a letter guaranteeing completion of the ir-



rigation plant and that a sufficient supply of water will be given on this year I can close with the Virginia man now. Now do this at once if it is possible. Please send some cash as we are clear out here and must have some money.

91.

Letter dated Portland, Oregon, March 3, 1911 to DeLarm & Biehl by Geo. C. Hodges, Seattle, Washington. We received the following letter this morning. Please advise us what your wishes are in the matter.

March 1, 1911.

Oregon & Washington Trust Company,  
Portland, Oregon.

Gentlemen:

This is to notify you that the Columbia River Orchard Company has not paid the interest on its bonds, Nos. 95, 96, 38, 85, 87, 35 and 86, according to the coupons therefore, all of which were due November 1, 1910. These bonds and coupons belong to our clients, J. G. Taylor and O. W. Little, and we hereby request that you at once proceed to foreclose the mortgage held in your name as trustee, as security for the payment of said bonds and interest, in order that the claim above mentioned may be satisfied.

DOUGLAS, LANE & DOUGLAS.

92.

Letter dated Portland, Oregon, March seven, 1911 to DeLarm & Biehl by Hodges.



I have an opportunity to buy some Ykakait lots and it strikes me that the lots in Ykakait might be a good thing for us to fill in trades with bonds, that is, if we can get them in lots of five and ten in different blocks, which I think I can do. Of course they are all encumbered; clear deeds with each lot or bunch of lots. They can be gotten I think at the rate of \$20.00 apiece by taking as much as \$3,000 worth and up to \$5,000 worth. I can trade bonds outright for the lots. My idea is to get them in different blocks and in bunches of five or ten, or perhaps larger as we desire.

## 93.

Letter dated Portland, Oregon, March 14, 1911 to S. C. Douglas, Seattle, Wash. by Oregon & Washington Trust Co. by Geo. C. Hodges, trustee (Identical in language with No. 23 except last paragraph of No. 23 omitted.

## 94.

Letter dated Portland, Oregon, March 21, 1911 to C. H. Graves, Monroe, Wash., by Oregon & Washington Trust Co., by Geo. C. Hodges. Your favor of the 18th in hand and note your inquiry as to the market for bonds and will say that we are only the trustee for the bonds and cannot inform you as to their market value, only that we have never heard of them being sold for less than par.

## 95.

Letter dated Portland, Oregon, March 29, 1911 to DeLarm & Biehl by Geo. C. Hodges, by P. M. D.

I have arranged the matter with Mr. Sherlock here. He is to accept all the \$2800 in bonds and then we are to buy back \$500 of the bonds not later than Saturday. The Kilbournes went to the ranch today and will be back tomorrow, that is C. A. will and E. C. will go to Wahluke. I will sign the bonds and get them to you tonight.

## 96.

Letter dated Portland, Oregon, March 31, 1911 to DeLarm & Biehl by Geo. C. Hodges. Mr. H. is about to make a deal for the California property and will need at least \$2500 worth of bonds, perhaps a little more. Now I don't believe it would be a good idea unless we would get a mortgage on the property for the amount of the bonds, or say a mortgage on the property for the amount of the bonds but \$500, and allow him the use of \$500 in bonds and charge that to him. I think we will get a deal over today or tomorrow.

## 97.

Letter dated Portland, Oregon, April 3, 1911 to J. B. Lowry, Cashier Citizens Natl. Bank, Chattanooga, Tenn., by Oregon & Washington Trust Co. by George C. Hodges; (Identical statements as in No. 23, and adds: As to the market value of the bonds we have never known them to sell less than par. However, that will be enhanced by April 15, when the water will be turned on the irrigation project. We consider them a good investment considering the standing of the company, etc.

98.

Letter dated Portland, Oregon, April 4, 1911 to DeLarm & Biehl by Hodges.

We closed the deal on a small motor today for \$600 in bonds and have one on for a large one which will be either closed tomorrow or the deal will be off. I have at last pacified the man Sherlock, so we will hear no more of that, pending the final adjustment of the affairs on Saturday next.

99.

Letter dated Portland, Oregon, April 4, 1911 to DeLarm & Biehl by Hodges.

Now I would call your attention to the advertised sale at Ephrata, county seat of Grant County, of the ten acres in section ten, for the \$495 judgment which I gave Mr. Biehl a copy of the same when he was here. Be sure to give this your immediate attention, if you have not done so.

100.

Letter dated Portland, Oregon, April 6, 1911 to DeLarm & Biehl by Geo. C. Hodges.

I sent you last night \$50,000 worth of bonds, that is, ten \$5,000 bonds by express. Now, I want you to send me nine \$1,000 and ten \$100 worth to close up some immediate deals. We succeeded in closing the Rose City deal last night, and the taking up of the mortgage on the timber lands that we bought, the first deal we made, at \$1500, you remember. When this deal is straightened out we will have a man's farm which we bought for \$9,000, and which adjoins

that same tract. This deal will be closed up about next week and we want the bonds not later than Monday.

## 101.

Letter dated Portland, Oregon, April 7, 1911 to DeLarm & Biehl by Geo. C. Hodges.

I am rushing everything to a finish in that timber deal and we will try and get some action on that thing right away. I have got both the lawyers here in town chasing after the man.

## 102.

Letter dated Portland, Oregon, April 10, 1911 to Wm. Crawford by Oregon Washington Trust Co. by Geo. C. Hodges. (Identical with No. 23.

## 103.

Letter dated Portland, Oregon, April 27, 1911 to C. M. Joseph by Oregon & Washington Trust Co. by Geo. C. Hodges. (Identical statements as in No. 23.

## 104.

Letter dated Portland, Oregon, May 1, 1911 to DeLarm & Biehl by Geo. C. Hodges.

There has been about \$500 coupon or perhaps more than that presented for payment today on the Columbia River Orchards bonds. It would have been very much better if we had had the money here, and had been prepared to take up these coupons at once. As it is, the first fall out of the box, when the Oregon and Washington Trust Co., should have come to the front they failed. Now I hope that you will not al-



low this to happen again. The timber cruiser got back this morning and reports favorably on the timber tract. We have the privilege of going and *investigatin* the ranch and the sheep and the man has the privilege of going and investigating the land but not the bonds, so we will go over there about the last of next week and then one of us take him right up to Wahluke and show him up there and send him back down to Portland to close the deal. I think the timber deal will be already to go over about Wednesday, but will let you know about that later.

## 105.

Letter dated Portland, Oregon, May 10, 1911 to W. E. DeLarm by Geo. C. Hodges.

I am sending you description of the sheep ranch, with a copy of the agreement for purchase, with a proviso, that the man has put in it. It just came today to me. Now look this *think* over carefully so that you may be able to tell me *that* you think about it when you come down on Saturday. I have seen your man, Mr. Burkhard, and he brought his man in to see me this morning, and we had a long talk, he then brought his lawyer in to investigate the bonds. The deal looks good and think it will go over. The deal is for \$38,400. He prices his land at \$60 an acre. I will know about this in a day or so. I have another deal on for \$13,000 on that ranch adjoining the Tobey Bros. It may go through taking it at \$20 an acre. I trust that you will have everything



in shape to convince these Eugene people. If so, that deal will go over like a top.

106.

Letter dated Portland, Oregon, May 15, 1911 to DeLarm & Biehl by Geo. C. Hodges.

I am very sorry that Mr. DeLarm was not able to keep his engagement that he made *yesterday* for 4:00 o'clock, for I had arranged for him to see seven men, and among them was the Tobey's, and two of the others were the sheep men, and the other three were on other propositions which I had hoped to take up with him after the others had gone. There was altogether, deals to the amount of a little over \$250,000 involved. All of the men went away disgusted and some of them pretty mad, after waiting until 7:00 o'clock, and as for me it *knocked* me out so completely that I was sick all night and hardly able to be up this morning. The situation down here, to put it lightly, is critical. In the first place we have no money; and in the second place they are urging me to go over today or tomorrow to see the sheep ranch. They want that deal closed now, or not at all. I haven't even the money to take the trip. Montgomery is here today and I don't know what to do with him. The man on the Oregon City farm deal was in this morning, and he explained all the details to me. He is willing to accept the bonds immediately, but he must have \$2500 to get the deed out of escrow. Now he must be allowed to place a mortgage for that amount, or we will have to loan

him that amount on the bonds, or he cannot deliver it otherwise. Let me know immediately about this. I will take Montgomery out to see that tomorrow, as I can borrow \$10.00 from Brazell to do that. Leet goes down to the timber deal today and Hammet goes with him and if they come up here to investigate, I will have to handle them the best I can. Mr. DeLarm even neglected to sign and fill out the contract which I am enclosing for him to do. I also inclose three Oregon and Washington certificates for Mr. Biehl, Mr. DeLarm and myself, for Mr. Biehl's signature, and I think these had better be endorsed by you both, so they can be placed to the credit of the directors we *wlect*, and let the company still hold the certificates. We will elect Mr. Wright a director but we haven't another man for the other place, unless it is Judge Garretson, and we havent heard anything from him. Can you tell us anything regarding that?

The question of finance stares us bitterly in the face. Mr. DeLarm gave me a check for \$50.00 and \$20.00 in currency, while here, and I expended \$3.50 for taxicab fare and \$3.75 for railroad fare, and I have the balance of 2.75. The other went to pay the rent, that is \$50.00 and the stenographer, \$9.00. This is the day that I had signed up for the Puget sound to move in the Yeon Bld., therefore I am embarrassed another time as I haven't the money to pay the first month's rent of \$30.00 and I don't know how long they will wait. I have loaned the company, as it is,

\$210 and have got today just enough to buy my lunch. This is the situation just as it is, and I expect the Tobey Bros. suit to be brought at once.

107.

Letter dated Portland, Oregon, June 21, 1911 to Mr. H. E. Wood, Eugene, Ore., by Geo. C. Hodges.

Mr. Hammet was just in, and I told him what I told you this morning, that we wanted 50,000 acres of that timber land, and will give \$20.00 an acre in bonds and \$5.00 an acre in cash for same. Now I think that he and you could get this amount. I am figuring it this way, Mr. Wood, that you would be entitled to 5 per cent of the bonds on each hundred and sixty, which would be \$160.00 and 5 per cent in cash, which would be \$40.00 netting you \$200.00 for every claim you sign up. Now, Mr. Wood, this is the biggest proposition that ever came to you, my boy, for there is a chance to make \$50,000 in bonds and \$12,500 in cash, which would easily put you boys on easy street, and you can do this if you want to, and all we will bind you down to is there must be 45,000 feet to the acre. Of course the company will go through with the other deal if you desire, on the same basis that we took the last one on, or you can put the rest of the people, in Albany, in on the new deal if you desire. It don't make any particular difference to us, which way you do it.

108.

Letter dated Portland, Oregon, July 27, 1911 to DeLarm & Biehl by H.

Mr. Biehl has just phone me that he wired me \$100 today. I haven't got it yet, but suppose I will receive it later. Now this \$100 is all spent before I get it. I am just as bad off now as I was before. I have friends here in town and haven't the money to buy them even a decent dinner. I tell you it is pretty humiliating I didn't ask him to send me more money, knowing he would if it was possible. Now fellows I don't know what we will do down here if we don't get money, even a little bit. I will have to have more money right away in order to pay the telephone bill or, have the phone taken from us also the Western Union and other things are up and worrying me all the time. I haven't the heart to do anything and scarcely the inclination. Brokers are advertising bonds at five and ten cents. which has killed all of the deals and things are in pretty bad straights down here. Tell me when the water will be on.

109.

Letter dated July 28, 1911 to W. P. Rauch, Roseburg, Ore., unsigned.

The only report I have to make about the bonds is a good one, and that is a Seattle syndicate is trying to buy up the whole lot, offering seventy-five and above that amount, but I am still interested in turning my bonds into property, so if you can make any deal down there, either for timber at seventy five or good real estate, orchard land, preferably improved orchard lands, it would suit fine.



110.

Letter dated Tacoma, August 17, 1910 to W. E. DeLarm, Seattle, by Geo. C. Hodges;

Reports a number of prospective deals adding: Now I have given you a synopsis of the whole business and all the details so that you can see what we are doing that we may force everything to the limit. Mr. Dean and I didnt get to our beds last night till between 12 and 1 o'clock, we are allowing no stone to go unturned.

111.

Letter dated Portland, Oregon, August 18th, 1911 to DeLarm & Biehl by Geo. C. Hodges.

I beg to notify you that a special meeting of the Board of Directors of the Oregon & Washington Trust Company, called last evening for the purpose of acting upon my resignation as President, Treasurer and trust officer and director of said corporation, my resignation of all the above named offices was accepted; and said offices were declared vacant and so remain at the present time. I enclose herewith certificates of stock representing 65 shares of the capital stock of the company; and have placed the remaining one share in the hands of the secretary for the purpose of being turned over to whomsoever shall be chosen my successor in office. I trust that such successor shall be appointed at once for your own best interests. I feel that all of said stock belongs to you for the reason that it was your money with which the same was purchased. My reason for



resigning is that I feel that I will be able to render you more effective service along a different line. I have served the purpose for which I came here; the bonds are all disposed of; and there is nothing further to be done in this field, as we decided to discontinue trading at the office some time ago.

This action on my part may come as a surprise to you, but I have been carefully considering such a course for some time. I have been getting further in debt with each succeeding day, with no relief in sight. Your promises have been numerous and ever failing; so much so that I can place no reliance whatever in them. That you have done as best you were able under the circumstances, I have every reason to believe, however even the best intentions are futile and unavailing before an avalanche of debts. I could see no relief whatsoever in sight.

Mr. Derby has just paid his \$1000 note, which he gave at the time he made the loan on the property which Montgomery is to have. Derby informs me that if we will repay the money advanced by him, with a reasonable rate of interest, he will turn the property back to you; provided of course, that he has not disposed of the property in the meantime. He states that he does not desire to keep the property himself. By obtaining this money from Derby. I have been able to pay all the bills that the company owes in the City of Portland up to date; that is, I was practically able to do so. I advanced about \$98 from my personal funds; and it is a source of satis-

faction to me to know that I am leaving with no bills unpaid. I enclose herewith a statement showing the disposition of the money expended. The keeper of the boat and the party who held the mortgage on the same have been constantly harrassing and threatening us with suits; but with the use of the Derby money, I was enable to pay them both in full; and put an end to the impending suits. If nothing unexpected happens I will sell the boat tomorrow for a piece of property, and send the deed to the same in blank to you. The taxes are to be paid, and the abstract brought down to date, and the property is clear of incumbrances. I enclose you description of a piece of property in Eastern Oregon, for which the parties are willing to accept \$200,000 in bonds, the cash value of the property. I recommend that you put this in the hands of someone who will make the trade immediately and caution you in the selection of one to handle the proposition. Don't allow Mr. Humphrey to know anything about this deal until it is put through. Mr. Biehl knows I had \$10,000 worth of bonds on hand which I was holding for the Puget Sound; but I turned the same over to Mr. L. A. Smith, and taken up the order Mr. DeLarm gave him on me, deeming it best to have the matter straightened up with Smith, as he was threatening suit. I wired you today to send Mr. McWhorter down in the morning and trust that he will be here at that time. I leave in the morning for a little trip to the coast to try to get myself straightened out. I

am all run down at the present time. Trusting that you realize that the action I have taken with respect to the company is for our mutual best interest, I am with kind regards. There is in this office \$218,000 worth of blank bonds.

## 112.

Letter dated Portland, Oregon, Sunday directed to Dear DeLarm or Biehl by Hodges.

The checks Mr. D. gave me while up there are both protested, and I deposited one in one bank and one in another and drew against them, and the banks are raising Cain. Wire me \$100.00 Monday A. M. that was the amount of the checks. Humphrey tells me *Fox* got two checks and they both were bad and he is going to pull off all his men. Wells says not one thing has been done about the power and they are going to break camp and let 100 men go Monday. I must have \$800.00 for the *Mischol* deal on Tuesday or we *lose* all these things and \$200.00 that is up. Tobey—are raising h— down here for the money that was promised *then* the 15th on a part of their contract; call me the first thing in the a. m. I tried to get both all day.

## 113.

Letter dated Portland, Oregon, Tuesday 21, 1911 to Dear De by Jack.

As per wire to you this A. M. saw Baum. He does not wish to make trouble and if you will make the 30-60-90 day notes and interest added for the time since goods were received with his Seattle lawyers

and tell them to call him up on phone, think it will be O. K. I told Baum that if he got receiver for co. he could not be preferred creditor but would only share with other non-secured creditors and I could only guess what he would get—sabe? Say same to his Seattle lawyers.

## 114.

Letter dated Portland, Oregon, Noon, Tuesday 17th to Dear De by Jack.

That *Plummer* fellow N. P. is some slippery customer. Nothing disagreeable at all, came up in our conference, so he is lying for some reason best known to himself. My personal opinion is that he is out for graft on the side. If you push him you will get what you want. He has also probably taken offense because Chapman got letter from Cooper to him. I know the Sammon's deal is good enough to put up to any bankers. Why, it's guaranteed by the Government when Chapman lands contract. Wish you would make the best deal possible on Interlaken House. If there is a judgment against me, see that it is taken care of in this deal, and do it quick. Have a deal smoking here that promises something good for us. It's not so big, but good. About \$60,000. Simply get interest in it, but in a short while can bank it. Expect to go down on the electric line tomorrow on a small farm deal. I could make a thousand deals on equities, but you know I cannot use them here in my scheme. I must make deal of some kind for expens-



es soon. This town has Seattle skinned a city block when it comes to being tight. June bonds at  $1\frac{3}{4}$ .

115.

Letter dated North Yakima, Wash. 8-10-11 to Dear De by Jack.

Came here under expense to look up Burrow's offer for Interlaken House, and try to make quick loan or sale and find it the worst kind of a lemon. If a mortgage for say \$3500 could be made on it & sold or traded in Seattle for something worth while, for some money, why O. K. Rose could be arrested for making the representations he does about it. Learned here that Strahorn fell down because the R. R.'s only sell land to folks who have ditches already in. Have sold all land here for \$10 per acre. Also learn that any irrigation company gets all lands not filed upon for a nominal fee in consideration of putting in a system. This applies on all Govt. land. A number of the filings at Wahluke can easily be disputed. I believe I'd look it up. Will be in Portland tomorrow A. M. This section is as dead as h))l. Am using all the *physic* thought pull I can on Clapp deal.

116.

Letter dated Portland, Oregon, 8-19-1911 to W. E. DeLarm by Jack.

Glad to hear the Plummer deal is coming O. K. Matters are getting warmer here and its a case of sitting on a very hot lid. I think you understand why it's so hard for me to help myself financially. Lord? I'm short of cash.



117.

Letter dated Portland, Oregon, 8-21-1911, Monday P. M. to Dear De by Jack:

Recd. a call from Montgomery's atty this A. M. Montgomery has left town and is somewhat peeved, also the atty. If it is possible, it is very good policy to dig up the \$50. and notes of the W. O. I. & F. Co. as per agreement to avoid sudden law suits both from them and Derby. They are now in communication with Derby trying to incite a riot.

118.

Letter dated Portland, Or., Tuesday 5:30 P. M. 8-22-11 to Dear De by Jack.

Am trying to get you by long distance. Have rounded up a few clear deals running from \$3000 bonds par to \$6000. Very good local traders & perhaps a loan value, am seeing to that. Humphrey's architect friend has tears in his eyes, so have decided to throw him the 10 lots in Astoria for *his own* bonds and wounded feeling.

119.

Letter dated Portland, Oregon, Aug. 23, 1911 to W. E. DeLarm by Jack.

Pursuant to instructions I have tied up section of lands so far as I have been able to. I got wind of \$100,000 swap in California this afternoon and I am hot after it. It is an improved, clear of incumbrance, about 8 miles from Los Angeles. It is recently inherited piece of property and—if,—party bring man up this afternoon I will get a night letter

off to the bank, where the family has been banking relative to immediate loan value, and believe me, if I get the O. K. the train won't travel fast enough to carry me down, and I will wire the stuff to Seattle. If I get good news relative to this will send a long distance call or wire.

The Tobey Bros. were in and we had an extremely amiable meeting, with no promises from me. I believe they are satisfied with the conditions, and I believe I shall *ge* along very nicely, I know. That man Humphrey has done us more harm in Portland than you *dan* ever realize. He was the first man (and I know it now) to peddle the bonds at any price for a meal ticket, and at the same time referring himself as forking for this office. I think out of about thirty broker I have talked to, I think about twenty have told me this same story, and believe me it has made a hard fight for us. The moment we can we must clean him and kick him out. If possible pay the Bent Piano Company on Third and Pike some money for me, as I am in a very dangerous position with them, I think you understand what I mean.

120.

Letter dated Portland, Oregon 8-24-11 to Dear De by Jack:

Signed up section on peculiar terms as per enclosed contract. Also ten acres unincumbered. This is in cultivation, and a very fine piece surrounded by orchards, no improvements and no irrigation necessary. Have \$6,000 or \$600 per acre. Am after

either loan or sale of same. Looks good, but you know it sometimes takes time. More deals on the table but it takes sifting. Am hot after California deal. The prodigal son who inherited this on the rampage (soused) and am somewhat delayed. Saw party ref. 12,000 acres, and it is progressing *fact*. It will cost \$50 plunks for the trip me and other broker who is broke. I might run short. Mullin of Seattle knocked a \$300 cash deal today for me, which was practically landed. That I figured for DeL & B. personal expenses but - - ? Am getting a line on some good outside deals and hope to shoot at least some cash over before the 1st of September. Lord knows I am working. Between Mullin and the other crooked brokers, the market for Portland property is N. G. Must get outside, where there is some good stuff too.

## 121.

Letter dated Portland, Ore., August 25, 1911 to R. S. Chapman by A. J. Biehl, directed to Seattle, Wash.

Have just secured option on gilt edge \$100,000 swap, so you see things are moving on this end, and look very good for DeLarm & Biehl, and am thoroughly satisfied that the Chapman, DeLarm & Biehl combination will yet materialize.

## 122.

Letter dated Sept. 1, 1911 to W. E. DeLarm by Jack.

Pursuant to conversation, got Columbia River Wa-

ter Company's certificate signed and away on 12:30 train, that will reach you this evening. Regret my neglect in this matter, knowing the hard game you are up against, but didn't think this was essential. I am hoping for the best. Tied up with a deal today for an improved ranch in Willamette Valley. Cost \$20,000 with \$5,000 mortgage. A dandy place, one half mile from town and railroad. I am satisfied I can sell for a few thousand cash difference quickly. Another deal offered me where there is \$700. Looks good, and guess I will close, but can only put deal over in escrow, pending delivery of bonds, and I sure need bonds. If I had them now, I would go down the line good. Am getting perspective of the real estate in and around here.

123.

Letter dated 9-3-11 to Dear De by Jack.

The whole d—d Biehl family was on the brink of hungry town when the phoned money arrived. \$9.50 for room rent, \$3.40 borrowed money, leaving \$6.50 for us. Am supposed to look at a 190 acres partly in orchard and improved, two houses ranch tomorrow but as car fare is \$5.40 cannot go to close. Get those bonds to me sure anyway so I will have 'em by day after tomorrow A. M. Lord! how I want bonds. If you have to steal it, get me enough money over living expenses to get out and close a deal or two and get some mazuma in the bank both here and Seattle. Am not asking because I cannot get it out of deal, but by Heavens! I'm blocked completely, no bonds,



consequently no money. Absolutely nothing to start it. When you have Fox matter arranged, if only for a week or two, you can look to me for some of the "Necessary." Can get it here for the company without sacrificing, and it is better to get it that way. My aim is, and I know that yours is, to see that the company gets itself in a position to retire as *may* of the bonds as possible before the price goes up, as it is certainly and beyond question the only business-like thing to do. A lot of the brokers, both here and in Seattle, who have received bonds as commissions for making deals, sell them for whatever cash price they can get when they get hard up, and that hurts the bonds and the company. The big deal I have tied up for you will certainly place you in position to pick up a wad of them, and reduce the outstanding bonds very materially. Please don't think am asking too much of you, but get that additional remittance over the plate for reasons stated. You will be thankful if you do. Also the bonds by Wednesday A. M.

124.

Letter dated Portland, Oregon, 9-11-11 to Dear De by Jack.

Thanks for the \$50. If new June bonds are issued to replace February's refunded some one else besides myself must sign as secretary as you understand it must in John Day River deal. John Godfrey might do temporarily—see. This deal looks sure, so as soon as you can either get the mortgages together or enough February's in, print the *Hunes*



from it and let me close. It's a peach. Am rooting for you on the Fox deal and if mental telepathy will do any good, she's a go. Am after the Yamhill Co. farm out of which expect to get something. Certainly hope as I know wjat kind of h—l you are raising to get it in Seattle. This is the only real good place to swap. A week's trip with a bundle of them into the bush, and it would certainly get the money. Keep your nerve and forget the knockers.

## 125.

Letter dated Portland, Ore., Oct. 11, 1911 Thursday 7:30 P. M. to Dear De by Jack:

This trust co, thing is about the hottest lid I ever had the misfortune to sit on. Am really fearful of making deals, but am *lingin* up outside brokers. The Yakima trip cost \$20 and was a wild goose chase, rotten? Burrows is careless about his statements. Stalled Baum of the Pipe Co. here today. He states he does not wish to make any trouble at all but would like a little encouragement. It made him sore when you didn't keep the engagement with him in Seattle. However, sufficient unto the day. You know I am perfectly willing to stand the gaff here in every direction. Got a copy of wire to you from Chapman stating that either he or Ross would be in Seattle Thursday (today). It was sent from Minneapolis. It sounds like business. Of course Montgomery's lawyer is getting batty, says if it is not closed this week will *deman* more. If you can, all right, if not, guess I can stave it along awhile longer. Honestly,

I feel like jumping in the river. Talk about a ragging, I guess I am getting all of that nervous stuff that Hodges could will to me. Had hoped to rustle the coin for this end before this, but developments requires extreme care on my part, and am reserving the right to use it for obvious reasons .

126.

Letter dated Friday, Oct. 12, 1911, Portland, Oregon to Dear De by Jack.

You will get an inquiry from a lawyer named Imus from Kolarnus ref. the bonds. This seems to be virgin territory and think will begin to get some results from the first 2 side trips even if the leads were lemons. On account of expensive Yakima trip and this last one, along with the regular expenses am down to \$13.00 again. My room rent is due tonight, also the girl \$9.00. I dont need *bu* little until I can get a deal over. I told the Imus lawyer about mortgages & guarantee behind bonds & gave him name of W. O. I. & F. Co. I want to keep on making quiet little trips out as it is leading up to some good business that I can handle without fuss on this end.

127.

Letter dated Portland, Oregon, Oct. 25-11 to Dear De unsigned.

Tobey's were just in and asked me to write to you and ask you to make them a proposition to exchange their bonds (Feb. \$140,000) for land planted to alfalfa. Any time next year will do just so it is planted next year. Have received no word from you refer-

ence to Seattle director in Trust Co. It is certainly just that the Orchard Co. should have a director friendly to it in the Trust Co. on account of heavy business transacted by the Trust Co. for it. I would suggest Burrows or Nutter. Day and myself here making three in all.

128.

Letter dated Portland, Oregon, November 14, 1911 by Jack.

F. L. Evans, a real estate broker of Salem, Oregon, called this morning and claimed to bought bonds for cash from a credited representative of the Columbia River Orchards Company with written authority to sell bonds. He insisted that the company was responsible and unless they bought his bonds (he has 3,000 of June issue) he would start proceedings against all three companies. I told him to get busy. Finally he decided all he wish to see was the Trust Agreement. I told him it was in Wright's hands and I would get it back in a few days. What I want to know is, where is this trust agreement? I don't seem to be able to locate it down here. If it isnt here, send a copy. It looks bad when I cant show it to people here in the office. Of course I shall never let it get out of my hands. From what Jackson told me when here Chapman's timber man from Chicago had positively agreed to put up a million dollars on the timber syndicate. Why is he hedging to you?

129.

Letter dated Portland, Oregon, Nov. 22, 1911 to De by Jack;

For Lord's sake get something out of, or make a raise for us Interlaken deal. We are up against it good for cash. It is impossible to raise anything on Wash. property here, or would say ship it down. Yours truly can get along but the rest cannot. I think you will understand how urgent it is.

130.

Portland, Oregon, December 15, 1911, letter to F. W. Waters by Oregon & Washington Trust Co. by A. J. Biehl trust officer.

Same statement as Ex. 23.

131.

Letter dated Saturday Portland, Or., to DeLarm by Jack.

Knowing how hard money is to get in Seattle I hesitate to ask for it, but I simply must I am flat broke, Have borrowed to the limit, I mean money for house necessities, not clothing or luxuries. My hands are tied here as trustee as you know. Have had some hot scraps this week. You are allowed to raise money in ways I cannot.

132.

Letter dated Portland, Oregon, Dec. 26, 1911 to W. E. DeLarm, Pres. Columbia River Orchard Co., Seattle, Wash. by Oregon & Washington Trust Co. by A. J. Biehl.

I find upon examination that the following list of



Water Mortgages are not notaried and properly assigned to the Trust Company. Please have this done at once and return as soon as possible. I accordingly expressed them to you today. (list of 14 on upper level given. I must have mortgages or a proper record of them.

## 133.

Form of land certificate.

This is to certify that the Washington Orchard Irrigation and Fruit Company, a corporation of South Dakota, in consideration of the sum of seven hundred fifty dollars to it in hand paid of which receipt is acknowledged as payment to it in full, does hereby agree to sell and convey to .....or his assigns, on or before April 1st, 1912, five acres of land under and capable of being irrigated by its irrigation system at Wahluke, Grant County, Washington, and deliver a certificate or abstract showing good title in the company together with a certificate entitling the purchase to the perpetual use of water from the canals and laterals of the company's etc. (provision for payment of water rates omitted) Provision for surrender of certificate, locating land, and getting deed, etc., omitted. Provision for written notice of assignment. Signature of company.

## 134.

Deed by Mary A. Domay to Washington Orchard Irrigation and Fruit Company executed April 29, 1911 to SW $\frac{1}{4}$  of SE $\frac{1}{4}$ ; the E $\frac{1}{2}$  of SW $\frac{1}{4}$ , the SE $\frac{1}{4}$  of NW $\frac{1}{4}$  of Sec. 10, twp. 14 N. R. 26 E. W. M.



134½

Statement of assets of *Washing Orchard Irrigation & Fruit Co.* made to Mr. Sox by Biehl:

## Assets:

Real estate Seattle .....	200,000.00
Real estate under project .....	200,000.00
Improvements on project .....	250,000.00
Water rights 10000 acres at \$100 .....	1,000,000.00
Supplies on hand .....	3,000.00
Stock in other corporations .....	303,000.00
Two ranches .....	5,000.00
Treasury stock .....	100,000.00
	<hr/>
	2,061,000.00

## Liabilities:

Capital stock .....	1,500,000.00
Bills payable .....	8,750.00
Due contractor .....	12,000.00
Due on real estate .....	28,000.00
	<hr/>
	1,548,750.00

Surplus ..... 512,250.00

Irrigation project: 17000 acres along Columbia River, Grant County, Wash. 60 ft. lift, sold to settlers at \$100 per acre, pumping plant practically completed 9 miles ditch completed in 15 days.

135.

Seattle, Wash. Sept. 22, 1910. Columbia River Orchards Company to Kilbourn & Clark, engineers.

Summary of expenses for erecting pumping station at Wahluke, Wn.

Expenses prior to April 1, 1910 \$1375.33.

March	10, Chief engineer 35 days at \$15...	425.00
	15, Draftsman 32 days at \$5 .....	160.00
	15, Surveying 22 days at \$7.50 ...	157.50
	31, Traveling expenses Asst. Eng.	
	Jan. ....	33.50
	31, Traveling expenses Asst. Eng.	
	Feb. ....	90.85
	31, Traveling expenses Asst. Eng.	
	March .....	20.65
	31, Miscellaneous expenses .....	185.00
	31, Construction payroll Wahluke	183.75
	31, Stationery and blue prints ....	119.08
April	30, Drafting of plants 3 days at \$5.	15.00
	30, Chief engineer's services 8 days	
	at \$15 .....	120.00
	30, Field engineer 1 mo. 5 days at	
	\$100 .....	116.65
	30, Invoice Puget Sound Bridge &	
	Dredging co (3-31-10) .....	3,770.09
	30, Invoice Puget Sound do .....	1,902.30
	30, Invoice do payroll (4-30-10) ..	1,410.55
	30, Invoice Kilbourne & Clark co..	933.55
May	31, Chief engineer 12 days at \$15..	180.00
	31, Asst. Eng. 10 days at \$7.50 ....	75.00
	31, Field Engr Wahluke 1 mo. ....	100.00
	31, Invoice Puget Sound Bridge &	
	Dredging Co (5-15-10) .....	4,375.28

	31, Invoices do (4-30-10) .....	1,092.38
	31, Invoice The Moran Co .....	487.29
	31, Invoice do .....	1,988.24
	31, Invoice do Kilbourne & Clark .	271.68
	31, Invoice Puget Sound Bridge & <i>Dredging</i> Co (5-25-10) .....	5,580.23
	31, Advances, Freight, cartage, etc.	85.07
June	30, Invoice Curtis & Co .....	450.28
	30, Invoice Crane Co .....	427.23
	30, Invoice Gorham Rubber co. ....	5.64
	30, Invoice Grant C.o. Abs. Col ...	17.50
	30, Invoice Holabird Electric Co. ...	2.60
	30, Invoice Keasby & Mattison Co.	281.46
	30, Invoice Grant Co. Abs. Co. ...	2.95
	30, Field engineers salary 1 month	100.00
July	31, Invoice Grant Co. Abs. Co. ....	35.00
	31, Invoice Puget Sound B & D Co.	4,667.55
	31, Invoice Crane Co. ... ..	231.77
	31, Invoice General Electric Co. ...	121.55
	31, Invoice Puget Sound B. & D Co.	1,533.86
	31, Field engineer sal. July.....	59.96
	31, Watchman's salary Wahluke...	56.00
	31, Watchman's acct Supplies ....	2.45
1g.	31, Invoice Puget Sound B. & D. Co.	900.43
	31, Invoice Gen. Elec. Co. Motors etc, .....	1,625.00
	31, Invoice DeLaval Steam Turbine Co. pumps .....	1,600.00
	31, Watchman's salary month ....	70.00
	31, Watchman's acct. supplies ....	11.40

Sept. 20, B. J. Montgomery drayage ...	11.00
20, Watchman's salary Sept. ....	70.00
20, Invoice Moran Co. (Interest ac)	96.46
20, Open River Nav. Co. Ft. ....	25.85

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36,284.58

Engineers percentage as per contract 25 per  
cent added to total cost ..... 9,071.14

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45,355.72

July 15, by cash J. E. Hawkins. .... 1334.00

July 15, by cash Sam Archer ..... 825.00 2,159.00

136.

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43,196.72

Letter dated Seattle, Oct. 27, 1910 to W. E. DeLarm, Prest Columbia River Orchards Co. City. by Kilbourne & Clarke Company by M. P. McKercher, Auditor.

We are pleased to acknowledge receipt of one thousand dollars, proceeds of sale of equity in Lots 2-B, 32 Green Lake Home Addition. We have credited the account of the Columbia River Orchard Company, less deductions, as follows:

Recording deed to E. C. Kilbourne ..... 1.25

Notary fee on E. C. Kilbourne deed to E. H.

Bartholf ..... .50

Excess taxed returned to E. H. Bartholf ... 17.58

Check to W. E. DeLarm ..... 100.00

Statement Osborne Tremper & Co. .... 6.25

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125.58

Balance of \$874.42 was credited as above mentioned to Columbia River Orchards Company. Trusting that you will continue the good work, and that we will receive other remittances in the near future, we are.

137.

Letter dated Seattle, Wash. Nov. 8th, 1910 to W. E. DeLarm, Pres't Columbia River Orchard Co., from Kilbourne & Clarke Co. by E. C. Kilbourne, Manager.

Answering your inquiry regarding cost of completing plant and time of payment on the account rendered you Sept. 22d, will say that it will cost approximately \$5500.00 to complete the intake, install the motor pumps, piping and wiring, including freight on the machinery from the East. This does not include the pipe line from the plant to the canal. As regarding the time of payment, if we receive \$20,000 in cash within the next twenty days, we can arrange payments on the balance at the rate of \$5000 per month, beginning January 1st, 1911.

138.

Seattle, Wash. Sept. 20, 1910.

Received of the Columbia River Orchards Company deed from John Reinmuth and Lucile Reinmuth, his wife, to blank for lots 16, 17 and 18, Blk. 36 Coulters Add. to City of Tacoma. Kilbourne & Clark Co. by E. C. Kilbourne.

139.

Seattle, Wash. Sept. 20, 1910.

Received of Kilbourn & Clark mortgages of Frank



Clymer for \$16,000 and Wm. E. Stickels, for \$16,000.  
The Columbia River Orchards Co., by A. J. Biehl.

140.

Letter dated Seattle, June 8, 1911 to Puget Sound Realty Company, attention Mr. Hodges, by E. C. Kilbourne.

Enclosed please find list of mortgages which were turned over to us by the Columbia River Orchards Company, and which we returned to them. We never had the two that Mr. DeLarm telephoned about, namely; Jas. Markley and Peter Fourtier, he asked me to send them to you provided I found them. He also asked me to write to Nott at Olex, Oregon, letting him know that we had not expected to purchase his land. Mr. C. A. Kilbourne wrote such a letter in your office dictating it to your stenographer, and she sent a copy of the letter to to me. I am somewhat doubtful of the wisdom of my writing on top of the letter from Mr. Kilbourne, copy of which we enclose.

141.

Messrs. DeLarm & Biehl.

The mortgages turned over to us and which we returned were as follows:

80 acres James Perry & Wife .....	\$ 8,000
160 acres J. C. Koppen and wife .....	16,000
160 acres Frank Clymer and wife .....	16,000
160 acres Alfred Gagner and wife .....	16,000
160 acres W. E. Stickel .....	16,000
160 acres Virgil H. Robinson .....	16,000

E. C. KILBOURNE.

142.

Portland, Oregon, May twenty-nine Nineteen eleven.

Mr. Nott, c/o Wade & Wade Co. Olex, Ore. Dear Mr. Nott: When Mr. Kilbourne and myself were in Olex we had some little talk with you regarding the purchase of your 640 acres adjoining our property. Today in passing through Portland, I meet Mr. Geo. Hodges, President of the Oregon & Washington Trust Co. which called the matter against to my mind. We would like to have purchased your land, but conditions have so changed since we saw you that it would be impossible for us to make you any proposition this year. Several unexpected matters have come up and in addition we have had to buy about \$6,000 worth of machinery for the ranch, so that we will have *know* cash available for land purchases. If you can make any deal with Mr. Hodges, for the sale of the land for exchange in 7% bonds, similar to the Tobey deal it will be satisfactory to us, and possibly later we will be able to make some trade with him for some other property. I am just on my way to California and it is not likely that either of us will be able to be in Olex before the first of July. With kindest regards, I am

Yours very truly,

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143.

Assignment by The Columbia River Orchards Company. This assignment is made merely for the

purpose of securing the performance of a certain contract made by the Columbia River Orchards Company on the 18th day of January, 1910 with Kilbourne & Clark Company of Seattle, and shall be *void* upon the performance of said conditions by said The Columbia River Orchards Company; and in case of a breach by said The Columbia River Orchards Company, the above mortgages shall be held as security for any damages which may be sustained by said assignee by reason of said breach; and upon the performance of said contract or the satisfaction of said damages said mortgages shall be reassigned to said assignor; but said mortgages shall not be further assigned with the written consent of The Columbia River Orchards Company.

Kilbourne & Clark Company

by E. C. Kilbourne, Vice President

Dated April 30, 1910

144.

Seattle, Wash, Sept. 21, 1910. Received of Columbia River Orchards Co. deed from Bertram H. Taylor & Geo. C. Hodges to ————— for lots 13 & 14 Blk 5 Palisades Addition to Seattle. Kilbourne & Clark Co. by E. C. Kilbourne.

145.

Letter dated Seattle, May 27, 1911 to C. M. Glover, Rock Creek, Oregon by E. C. Kilbourne: Yours of May 25th giving description of the land received. I have examined the 640 acres that is in wheat and believe it to be a fine tract of land. The other two pieces I have never seen, however, the price is too

high for us ; We can get the adjoining land for \$12.50 per acre. We understand that it has not been cultivated for two years, and therefore is not worth as much as the other which is in wheat. The parties from whom we bought the Tobey ranch might be interested in securing yours and I have taken the liberty of referring your letters to them, they are Messrs DeLarm & Biehl in the Empire Bldg., Seattle, Washington, and they will probably write you. They have made some extensive purchases of lands in Oregon, and I understand they just completed a deal for several thousand acres of timber land. They bought the Tobey Bros. ranch and paid for same in bonds of the Columbia River Orchards Co. You might write them addressing them as above.

146.

Letter dated Portland, Oregon, Feb. 7, 1911 to C. A. Kilbourne, Seattle, Wash. by H. S. Wells, Ass't Mgr. New Business ; I am writing you to confirm our phone conversation of this date in regard to closing power contracts with the Columbia River Orchard Company. I put the proposition, the Orchard Company taking 150 H. P. for 1911, 300 H. P. for 1912, 450 for 1914 and 600 for 1915, to our management, and the question as to whether we can accept this or not will depend on our receiving a report on the holdings of the said company. In this statement of their holdings we would like to know just what title they have to the land and if they do not have a clear title, what encumbrances there are. As soon as we can get this information, we will ad-



wise definitely just what we can do. Thanking you very much for your kindness in the matter, I am.

147.

Letter dated Seattle, Washington, Feb. 10, 1911 to Kilbourne-Clark Co., Seattle, Wash by the Columbia River Orchards Company: Replying to your request for a statement of the lands owned by our company, or on which *the* have mortgages for delivering water, we submit the following:

About 1400 acres of land in fee simple on which there is a part of the purchase price still due, of which there has been enough of the land sold to complete the purchase price and leave upwards of \$100,000.00 Balances due on this is in the form of real estate contracts with notes attached. The company have mortgages for water on about two thousand acres more, all of which is to be supplied with water from the first unit of our system. The total number of acres coming under this first project is about 17,000 acres, of this amount 5,000 acres are railroad land, and the balance, in most instances, contracts have been made with the owners to supply water. In addition to the above, the company has real estate holdings in the cities of Seattle, Tacoma and Portland.

148.

Letter dated Seattle, July 7, 1911 to DeLarm & Biehl, Seattle, Wash. by The Kilbourne Co. by C. A. Kilbourne, Prest. Replying to your telephone inquiry of today we enclose herewith a separate sheet,



giving an inventory of the buildings, equipment and tools on our ranch in Gilliam County, Oregon. We have not thought of selling the ranch, as we believe it to be a first class proposition which will increase right along in value and earn a large percentage on the investment in the meantime. However, on account of a desire to settle up our partnership matter, we will consider any reasonable proposition *mde* to us at this time. The land is situated in Gilliam County, Oregon, twenty miles south of the Columbia River, at an elevation of about 1200 feet above sea level. The soil is a rich volcanic ash, from three to seven feet in depth. There is no scab land on the place. The land is slightly rolling and is out by a sloping ravine and two or three draws which are fenced out for pasture land. A large proportion of the tillable land is level or nearly so, and all of it is smooth enough to be plowed by either traction engines or stock. There is a 7% mortgage against the place dated March 20, 1911, and payable as follows: \$5,000.00 in three year, \$5000.00 in four years and \$10,000.00 in five years. There is also a 3 years mortgage of \$2500.00 on a separate adjoining piece of land, consisting of 840 acres. The entire ranch consists of 5290 acres, being a strip of land about two miles wide and four miles in length, the buildings being situated in approximately the center of the tract. The 2000 acres under cultivation last year, produced about 17 bushels of wheat per acre or 34,000 bushels, which was sold at an average price

of 79 cents, making a gross return of about \$27,000.00. The cost of operation is about \$7000.00 leaving \$20,000.00 as net profit. The foregoing are the figures furnished by the former owner and seem to be *born* out by our own experience since the property came into our possession the first of *march*, 1911. It is but fair to state that we do not expect a large crop this year as the district has had less rainfall than at any season during the past 35 years. It is very unusual to get as low a yield as 15 bushels per acre, and during good years it runs as high as 30 bushels. The market price of blue stem wheat (which is the variety we grow) at this time, is 97 cents at Portland. The freight rate from Shuttlers which is our shipping point to Portland is 8½ cents per bushel. Shuttlers is on the Condon granch of the O. R. & N and is ten miles from the ranch, down hill haul all the way. Any other information which you desire regarding the property, kindly let us know.

149.

Letter dated Portland, Ore., April 8, 1911 to Mr. Leet, City by Oregon & Washington Trust Co. by Geo. C. Hodges.

Enclosed find the names of some people you can refer to in making your inquiries about the Columbia River Orchards Company's bonds:

Wm. F. DeGraff, Loman Bldg., Seattle, Wash.

Morrison & Eschleman, Alaska Building, Seattle, Wash.

Wm. F. Howe, Am. Bank Bldg. Seattle, Wash.

E. T. Wright, Leary Bldg., Seattle, Wash.

Mercantile Bank, Seattle, Wash.

H. P. Nolan, 117 Cherry St., Seattle, Wash.

These people all of them know what the Columbia River Orchard Company's bonds are and most of them have some of the same.

150.

United States of America,

District of Oregon,—ss.

I, C. A. Kilbourne, and I, E. C. Kilbourne, first being duly sworn say:

That I desire to make more clear that portion of my affidavit already filed in this case where on page 4 at line 19 it is stated that after our corporation practically retired from business we agreed as individuals to do some further work, and what we agreed as individuals to do was to complete the pumping plant at Wahluke, which we did, as already stated, at a cost of approximately seventeen thousand dollars (\$17,000), and as individuals we also agreed on demand to put in the additional unit referred to.

And I further say in relation to the second mortgage which has been referred to, but without admitting the validity or correctness of said mortgage, that the facts and circumstances were and are as follows:

We desired to be released from the claim on us to put in the additional unit, as we were preparing to go out of that business and felt that the manage-

ment of this land would tie up all our resources and energies. We therefore bought our release for the sum of approximately ten thousand dollars (\$10,000), which was the estimated cost of putting in the additional unit. That the only convenient or available means of making this payment to DeLarm's corporation was by raising it on this land, and this is ten thousand dollars of the second mortgage on the land. We also were very solicitous to have the Puget Sound Bridge & Dredging Company paid the seven thousand five hundred dollars (\$7,500) cash which DeLarm had agreed to pay but which he never had paid and which was in reality the debt of our corporation, and to raise this money we also were obliged to resort to the second mortgage, and these two sums make the sum total of the second mortgage, seventeen thousand five hundred dollars (\$17,500). This mortgage was made in favor of Wakefield for the reason that he was the accredited agent of Clapp and Lutz, just as Mr. Burns is of The Edinburg and Pacific Coast Mortgage Agency, Limited, and Mr. Wakefield said no money would be paid until the mortgage was on record, which is also the practice of Balfour, Guthrie & Company. Wakefield was to pay ten thousand dollars (\$10,000) of this money to DeLarm's corporation for our release, as aforesaid, but the seven thousand five hundred dollars (\$7,500) which should have come to me, C. A. Kilbourne, was never paid to me by Wakefield and I have never been able to get any explanation from



him, and at least this portion of the mortgage will be disputed by me, which is the reason I do not desire to make any statements committing me as to its validity. I myself as the maker of the mortgage expected its full return, seventeen thousand five hundred dollars (\$17,500), and I never consented to the payment of any bonus.

Referring to the showing made by our corporation before the Referee in Bankruptcy, this was long after the settlement between DeLarm and his corporation and myself concerning the land, to-wit, more than one year, and the eleven thousand dollars (\$11000) referred to in the testimony before the Referee is a balance due and owing to the Kilbourne & Clark Company and not from the Washington Orchard Irrigation and Fruit Company, as stated in the affidavit on file, but from the Columbia River Orchards Company, which is the company for which we were constructing the pumping plant. We at no time ever had anything to do with the bankrupt under consideration, the Washington Orchard Irrigation and Fruit Company. This balance of eleven thousand dollars (\$11,000) is arrived at as follows; Seven thousand five hundred dollars (\$7,500) is the sum due to the Puget Sound Bridge & Dredging Company, which should have been liquidated by DeLarm under the terms of our settlement with him; twenty-seven hundred dollars (\$2700) is the sum due the Moran Company, which also should have been liquidated by DeLarm under the same settle-



ment; and the balance, making up approximately eleven thousand dollars (\$11,000), is attorneys' fees and expenses.

(Signed) C. A. KILBOURNE.

E. C. KILBOURNE.

Subscribed and sworn to before me this 27th day of August, 1912.

ERSKINE WOOD,

(Notarial Seal)

Notary Public for Oregon.

151.

United States of America,

District of Oregon,—ss.

I, Edward C. Kilbourne, and I, Charles A. Kilbourne, being first duly sworn, say each for myself, that I am one of the respondents named in the above entitled bill of complaint; that though I have the same name as my co-defendant we are not in any way related.

That heretofore, to-wit, 1901, I, Charles A. Kilbourne, caused to be incorporated under the laws of the State of Washington with its principal office in Seattle, the Kilbourne & Clark Company, the principal business of which was as engineer and contractor for electric power and pumping plants and the sale of allied machinery. That thereafter, to-wit, 1905, I, Edward C. Kilbourne, became a stockholder in and associated with the said Kilbourne & Clark Company as electrical engineer and expert; that after said last named date the said corporation built very many pumping plants of varying capacity, in-

cluding ten pumping plants on the Columbia River. That in course of our regular business as electrical engineers and contractors W. E. DeLarm, president of the Columbia River Orchards Company, came to us, to-wit, toward the end of 1909, and represented to us that his company had an irrigation project near Wahluke, Washington, and requested us to submit plans and estimates for a pumping station in connection with said irrigation plant. This we did and subsequently entered into a contract with the Columbia River Orchards Company to act as construction contractors and engineers for said project. DeLarm was a stranger to us and as a natural business precaution we asked some evidence of credit and responsibility, and he submitted to us a statement showing assets of the said company aggregating about nine hundred thousand dollars (\$900,000), against which was a total liability of about three hundred thousand dollars (\$300,000), being a bond issue which was by him to us represented as practically as good as sold in the East. On this showing and having faith in Mr. DeLarm, we contracted with his said corporation and work was started which later had to be rushed day and night to avoid damage by reason of the rapid rise of the Columbia River.

We associated with us in this work the Puget Sound Bridge & Dredging Company, one of the largest and most responsible contracting corporations in the country. It afterward transpired that the sale of the bonds referred to was not consummated, and

after our account for the said DeLarm corporation had reached over forty-three thousand dollars (\$43,000) we stopped our work pending a settlement.

While matters were thus suspended DeLarm came to us, to-wit, February 1911, and asked the affiant, E. C. Kilbourne to go with him to Gilliam County, Oregon, to examine a ranch which he had purchased there on which he wished an opinion both as to quality of the land and particularly as to its adaptibility for irrigation. Upon DeLarm agreeing to pay all expenses, which he did, I, E. C. Kilbourne, went with DeLarm to Portland, Oregon, where one of the complainants in this suit, Mr. Tobey, met us and went with us to Olex, Gilliam, County, Oregon, where he showed DeLarm and affiant E. C. Kilbourne the property. I, E. C. Kilbourne, had no other business than as consulting engineer and I did not know then and never did know anything of the deal between DeLarm and Tobey as set up in the complaint, or otherwise. None of the details were ever discussed in my presence, I never knew the price paid, although I heard afterward that one hundred and forty thousand dollars in par value of first mortgage bonds was a part of the purchase price between DeLarm or his corporation and the Tobey's. I gave Mr. DeLarm my opinion as an engineer, which in a general way was favorable, provided he could secure water, and I, E. C. Kilbourne, then returned to my place of business in Seattle.

Afterward, to-wit, March, 1911, DeLarm again ap-

proached us and stated that he was unable to raise the cash to pay our claim, and he proposed that he turn over to us the land which I had examined in settlement and that we go ahead and complete his pumping plant on which work had been suspended. After a good deal of hesitation and protest and finding that Mr. DeLarm had no money available with which to pay us, we agreed to take this land as part settlement of our claim, but we did not at that time agree as to what allowance or value we would put upon the land in our settlement. We were unwilling to take the land and nothing else, as it would practically put us out of the contracting business and require us to switch all our capital and energies to developing this tract of land, but in accordance with our agreement to take the land subject to a subsequent appraisal or agreement of value, I, E. C. Kilbourne, again proceeded to Portland, Oregon, where the complainants in this case, the grantors, met Mr. DeLarm and at his request transferred the title to said lands by deed to me, E. C. Kilbourne. In final settlement of the matter we finally agreed to take this land in full payment and satisfaction of all our claims, providing DeLarm's corporation, the Columbia River Orchards Company, would furnish seventy-five hundred dollars (\$7500) cash, for which sum the Puget Sound Bridge & Dredging Company agreed to release their lien against the pumping plant which we had constructed together with them for the said DeLarm corporation, and also provided that the said DeLarm



corporation would assume a certain claim of the Moran Company, of Seattle, against the pumping plant in the sum of twenty-seven hundred dollars (\$2700); and we as individuals, also agreed that upon certain conditions upon demand it would within a year, if demanded, perform certain other work of the estimated cost and value of, to-wit, ten thousand dollars (\$10000), to-wit, would add another unit to the power of the pumping plant. DeLarm accepted these terms and we went on and continued the work on the pumping plant, on which we expended a further sum, of, to-wit, seventeen thousand dollars (\$17,000).

We supposed that our claim and the lien of the Puget Sound Bridge & Dredging Company were the principal demands on DeLarm's corporation for ready money, and with these out of the way by the settlement of the Puget Sound Bridge & Dredging Company's lien, as aforesaid, and by our taking the Tobey land in payment of our claim and for the further completion of the plant, we saw no reason why the Columbia River Orchards Company's enterprise at Wahluke should not be a success.

We performed every part of our part of the agreement of settlement between us and DeLarm's corporation.

I, C. A. Kilbourne, further say that to carry out the construction of the plant referred to, which we had undertaken to build for the Columbia River Orchards Company, and some other construction



work in which we were then engaged, I had advanced to the Kilbourne & Clark Company the sum of, to-wit, seventy-two thousand dollars (\$72,000), and in payment of this indebtedness the title to the said land was transferred to me, to-wit, March 25th, 1911, by E. C. Kilbourne, who had taken title from the complainants herein. I found that the said land instead of being worth seventy to eighty thousand dollars, as represented to us by DeLarm, was and is not worth more than, to-wit, fifty-five thousand dollars, and has been appraised by the Mortgage Loan Department of Balfour, Guthrie & Co., at fifty-two thousand four hundred dollars (\$52,400), and the largest loan we could get upon the property at the time we were endeavoring to place a mortgage upon it was twenty thousand dollars (\$20,000), at eight (8) per cent, which is the mortgage in question held by W. J. Burns. I further say that the said land is not under irrigation and is in the semi-arid or dry farming belt of Oregon and has produced in the past four years but one full crop, to-wit, this year's crop, and we have bought this current summer land of the same quality adjoining our land for \$10.89 an acre, and other connecting land is now offered at \$12.50 per acre.

Our own operation of this land is substantially as follows, to-wit:

Net loss from operation for the year ending March 1st, 1912.....	\$8,800.00
Cost of new equipment during the year to replace stock and equipment taken away	
By the Tobeyes .....	5,800.00
Approximate cost of operating and harvesting during the current year and necessary new equipment,.....	16,012.50
<hr/>	
A total expenditure of.....	\$30,612.50

The produce of the insignificant crop of last year has been taken out in making the net estimate of eight thousand eight hundred dollars (\$8,800), and the estimated returns from this year's crop, including seven hundred acres still uncut, are thirty-five thousand (35,000) bushels at seventy (70) cents a bushel, or twenty-four thousand five hundred dollars (\$24,500) exclusive of seed and feed wheat. Much of the money necessary for operation has been borrowed and will have to be repaid as soon as the crop is sold and delivered, which will require about ninety days more, together with interest due on the first mortgage, and as soon as harvest is over the entire force and further capital will be needed to get the soil in condition for fall seeding.

When the land was taken over from the Tobeyes it was not in good agricultural condition, much of it had not been plowed but only disced, and today it is being scientifically operated in a way, as already stated, requiring the expenditure of a great deal of

capital, and is in far better condition than it was when delivered by the Tobey's and, in my opinion, in far better condition than it would have been had it remained in possession of the complainants.

Affiants have endeavored to give to the Court some general idea of the actual facts, and I, E. C. Kilbourne, and I, C. A. Kilbourne now say, each for myself, that at no time was I in the confidence of either the Tobey's or DeLarm, or anyone connected with them; that I had no knowledge of DeLarm's financial condition other than as given to me by DeLarm and as in a general way I knew from my acquaintance with the Wahluke irrigation project which, as already stated, seemed to me under proper handling to have the conditions for success. On the other hand, I am informed and believe, and so state, that the complainants took several weeks in which to investigate the validity and value of the Columbia River Orchards Company bonds offered by DeLarm in payment of the land in question. I am further informed and believe, and so state, that the complainants had the advice of a skilled attorney, to whom they paid the sum of one thousand dollars for a thorough investigation of DeLarm's proposition, including not only the legal validity of the bonds but their value; and I know that Frank Tobey and William Tobey, complainants herein, spent considerable time in Seattle investigating the proposition for themselves, and though they knew that the Kilbourne & Clark Company was contractor for

the pumping plant connected with the project on which said bonds were issued, they never came near me, the affiant, or anyone connected with the Kilbourne & Clark Company regarding the matter, they never told me they were to be paid in bonds, and the present holder of the title, C. A. Kilbourne, never met either of the said Tobeys, complainants, until after the title had been vested in him; and I say that by reason of my business I have had an acquaintance in a general way with the bond market and irrigation bonds, and it is a notorious fact that the bottom dropped out of the irrigation bond market some two years ago and that many bonds on enterprises good in themselves and which under other circumstances could have been carried to success, have become practically valueless.

(Signed) EDWARD C. KILBOURNE.  
CHARLES A. KILBOURNE.

Subscribed and sworn to before me this 24th day of August, 1912.

FRANK C. HESSE,  
Notary Public for Oregon.

(Notarial Seal).

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### **Defendants' Exhibits.**

#### **A.**

Blue print of Washington Orchard Irrigation and Fruit Company canals, showing the sections, townships and ranges, the town of Wahluke and the divisions of sections 16 and 20 of twp. 14 N. R. 26 E.



and 35 of twp. 14 N. 25 E. into ten acre tracts.

B.

Same as A., but not as elaborate.

C.

Letter dated Tacoma, Washington, Jan. 22, 1912, to W. E. DeLarm, Seattle, by G. H. Plummer, Western Land Agent.

The proposition outlined to you on the 19th instant by Mr. Cooper, for the sale of lands owned by the Northern Pacific Railway Company, below your canal at Wahluke, has been approved and we are ready to carry out the arrangement at any time before March first. Under this arrangement we are to sell to your company all of our lands below the constructed ditch, containing approximately 3400 acres, at a price of \$45.00 per acre, on ten year contract plan; with interest at 6%. Some details of payments for deeds in less time omitted.

D.

Telegram. Dated Portland, Ore. Sept. 16, 11. J. A. Wakefield, Seattle, Wash. Good land in vicinity of Kilbourne Clark four thousand three hundred fifty acre ranch are held at twenty to twenty-five dollars per acre. W. L. Tobey.

E.

Agreement between W. E. DeLarm and W. L. Tobey, dated Feb. 25, 1911. Tobey agrees to sell 4350 acres Gilliam County ranch to DeLarm. "The agreed purchase price of the above property is as follows: \$100,000 for the real estate and \$20,000 for



tools, farming implements, live stock and other equipments and \$1250 for other supplies recently delivered on the property. - - - - -

Payment for above as follows: \$120,000. in 20 year 7% bonds of Columbia River Orchard Company of which \$3,000 are this day delivered as earnest money. - - - - -

Provision for deeds omitted. It is agreed that Tobey shall have until March 5, 1911, to investigate the above bonds, and that DeLarm will secure a loan of \$6000 for Tobey for one year at 7 per cent upon Tobey putting up as security \$2. in the bonds which he is to receive, for every \$1000 of the loan.

#### F.

Memorandum of agreement dated Jan. 18th, 1910 between The Columbia River Orchards Company hereafter called the Orchards Company, and the Kilbourne & Clark Company, hereinafter called the Engineer. Whereas, the Orchards Company is the owner of several thousand acres of land, situated in Grant County, Washington on the north side of the Columbia River, extending about seven miles west from Wahluke, and whereas, the orchards company is desirous of installing an electrical pumping plant, for the purpose of irrigating said land, and whereas, the Kilbourne & Clark Company are engineers, engaged in the business of designing and constructing irrigating plants; Now, therefore, it is mutually agreed as follows: The Columbia River Orchards Company hereby appoints the said Kilbourne &

Clark Company, as its engineers and purchasing agent with authority to design, purchase, and install a complete electric pumping plant for said Orchards Company on its property, situated on the Columbia River. And the said engineer—agreed to perform all the work, furnish all the apparatus and material, design and construct ready for operation, a pumping plant for said Orchards Company on their lands hereinbefore mentioned.

Description and details of pumping plant omitted.

The price to be paid shall be actual cost of all apparatus material, tools, labor, transportation and expense—with an added profit of or commission of a sum equal to ten per cent of the entire cost of said plant. The total cost of the plant including Engineer's profit shall not exceed \$40,000.00. It is agreed that the pay for the time of the individual members of said engineering company shall be calculated the time actually employed on this contract at the rate of \$15. per day for chief engineer and \$7.50 per day for assistant engineer. The engineer may sublet such portions of this contract as it may decide to be advisable in order to economize time and money. The Orchards Company agrees to pay the Engineer for said plant the sum of \$5,000 on or before March 20, 1910; and \$5,000. on April 15th, 1910; and \$5,000. on the first day of each month thereafter until fully paid.

#### G.

Amendment to contract of January 18, 1910.

This Agreement Witnesseth, that whereas under the terms of a certain contract of January 18, 1910, between the parties hereto it was agreed that the compensation to the Engineer, the said Kilbourne & Clark Company, in said contract, should be ten per cent of the total cost thereof;

And whereas the said Orchard Company agreed that certain payments should be made to the Engineer upon dates specified in said contract,

And whereas said payments have not been made, and by reason of the failure to receive said payments, said Engineer has been put to great expense and risk.

Now Therefore It Is Agreed, by and between the parties hereto as follows:

1. That the Columbia River Orchards Company will pay to the Kilbourne & Clark Company, as payment for said contract and work specified in said contract of January 18, 1910, the actual cost of all apparatus, material, tools, time, labor, transportation and expenses entering into the design, construction, completion operation and testing of said plant, and an added profit for commission (in lieu of the commission of 10% named in said contract of January 18, 1910; which is hereby annulled,) to said Engineer, the sum of ten thousand (10,000) Dollars, the said \$10,000 to be paid as work progresses, in payments equal to twenty-five (25%) per cent of the cost of all labor, and material, as said labor is performed and said material is purchased by said En-

gineer, and the balance on completion of the work.

2. That the clause in said contract limiting the total cost of the plant, including Engineer's profit to forty thousand (40,000) dollars shall be amended so as to limit the cost of said plant to fifty thousand (50,000) dollars.

3. That in case default shall be made in the payment of any sum or sums due the said Engineer as and when same shall be payable, the Engineer may, at its option; cease work and declare the entire amount due and payable, and it shall thereupon and thereby be entitled to payment of the entire amount of said contract price including all of said ten thousand (10,000) dollars commission, forthwith, whether the work shall be completed or not.

4. That in all other respects the contract of Jan. 18, 1910 remain in force.

#### H.

Agreement dated Feb. 17, 1910, between Puget Sound Bridge & Dredging Company of Seattle, Washington, party of the first part and Kilbourne & Clark Company, engineers, party of the second part.

That for and in consideration of payments hereinafter mentioned to be made by the party of the second part, the said party of the first part doth hereby covenant and agree to furnish all the materials and construct and finish in a good and workmanlike manner, in accordance with the plans and specifications attached hereto, or as amended from time to



time by said second party, the reinforced concrete pump house for the Columbia River Orchards Company, situated on the Columbia River near Wahluke, Washington.

It is mutually understood:

First. That this work shall include the complete installation of intake and discharge, including excavation therefor, and the placing of any or all machinery.

Second: That the party of the second part will deliver free at the site all pumping and electrical machinery, pipe and fittings, and shall erect such part thereof as it may elect, and that the cost of the same shall not be included in the cost of the work, on which the first party is to receive the  $12\frac{1}{2}$  per cent profit. It is distinctly understood that the party of the first part assumes no risk of damage to the said machinery in handling and setting the same, but will do all its work in a workmanlike manner.

Third. The work shall be begun within ten (10) days and prosecuted with vigor; it being the intention to complete the work to deliver the water for the coming season. The party of the first part agrees to complete the work by July first 1910, but will not be held responsible for any damages sustained by reason of non-completion at this date.

In consideration of the above mentioned work the party of the second part agrees to pay the party of the first part the total cost plus  $12\frac{1}{2}$  per cent for profit and plant rent. It being understood that the



total cost of work, including profit shall be paid by the party of the second part to the party of the first part on or before the 15th day of each month for all work done and material furnished during the previous month, including the  $12\frac{1}{2}$  per cent profit and a final payment to be made within fifteen (15) days after completion of the work.

Such cost to include all labor and material, small tools, lost or worn out, etc., and other expenditures necessary for the proper, safe and expeditious prosecution of the work.

Provided, that the party of the second part may terminate this contract by giving five (5) days written notice paying for all materials delivered, and labor performed, together with all expenditures as noted above, plus the  $12\frac{1}{2}$  per cent, up to date of cancellation of contract, and a sum equal to ten (10) per cent of the estimated cost of the uncompleted portion.

# I.

Water at 190' pump with windmill  
and gasoline engine.

4350 acres.

3000 acres can be irrigated.

4000 acres under cultivation.

2000 acres under wheat 1910 Ave 17 bu.

per A produced .....15000 sacks

$2\frac{1}{4}$  bu

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34000 bu

Took 1000 sacks or 2250 bu. for seed and feed.

Rented last year 1910. Recd. for own use 7000

sacks	15000 bu @ 78c	\$11700
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78

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120

105

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11700

Operating exp. last year \$6000.

Tobey's statement to me.

E. C. K.

1911 have 1400 acres seeded.

Will seed about 600 more.

In 13 years only had one poor crop.

9 horses      15 teams will do work.

23 mules      Takes 6 men and cook to run it.

Foreman 75 and found.

Men .35 found.

New caterpillar engine and plows cost \$5000.

J.

Letter dated Tacoman, Wash. June 9, 1910, to Mr. E. C. Kilbourne Seattle, by G. H. Plummer, Western land agent.

“Replying to your inquiry regarding lands owned by the Railway Company underlying the Columbia River Orchards canal, I beg to say that none of our land in that vicinity is for sale at the present time, all of our holdings *bein* reserved under instructions from the Land Commissioner.

I have already submitted to him the application made by President DeLarm for the purchase of a right of way for the canal and power house site and the Land Commissioner has advised me that he prefers to leave the matter until he comes West the latter part of this month, when he will look into it further and *etermine* whether or not sale will be made.

I am returning your map herewith as requested."

K.

Letter dated Seattle, Wash. July 13, 1910, to E. C. Kilbourne by Thomas Cooper, Land Commissioner.

"Replying to yours of the thirteenth instant; I instructed Mr. Plummer a few days ago when I was in Tacoma to quote to your Company a price on the right of way at Wahluke, and you will doubtless hear from him within a day or two. The inclosure to your letter is returned herewith."

L.

Seattle, Wash., October 31st, 1910.

COLUMBIA RIVER ORCHARDS COMPANY,

to

KILBOURNE & CLARK COMPANY, Engineers.

*Summary of Expenses for erecting Pumping Station at Wahluke, Wash.*

Expenses Prior to Oct. 1st. 1910. Accepted Sept. 27, 1910 by DeLarm,

Prest. .... \$43196.72

Oct. 20, Watchman's Acct. Sup-

plies for Sept. .... 14.75

Oct. 20, Recording Expenses —		
Green Lake Deed . . . . .	1.25	
Oct. 20, Expense Paid by E. C.		
Kilbourne Sales of Equity Green Lake Add. . . . .	19.33	
Oct. 20, Cash to W. E. DeLarm.		300.00
Oct. 20, Osborne-Tremper Invoice . . . . .	6.25	
Oct. 31, Columbia S. S. Co. . . . .	9.25	
" B. J. Montgomery "Drayage Acct." . . . .	8.50	
" Int. on note—Oct. 21st..	19.00	
" Recording Deed to E. C. Kilbourne . . . . .	1.25	
" Invoice Curtis Mfg. Co., Frt. . . . .	14.90	
" Invoice Moran Co., Int. Overdue Acct. . . . .	14.02	
" Invoice Crane Co., Int. Overdue Acct. . . . .	2.58	111.08
<hr/>		
" Engineer's Percentage per contract, (25 per cent added to Total Cost)	111.08	27.77
		<hr/>
		\$43635.57
Oct. 19, Credit Memo (Drayage Acct) . . . . .	11.00	
" Credit Memo (Watchman' Supplies) . . . . .	11.40	

" Credit Memo (Watch-		
man' salary Sept) . . . .		70.00
Oct. 25, Cash	Proceeds—Equity	
	Deed, Green Lake Add..	1000.00
Oct. 27, Cash	W. E. DeLarm . . .	100.00
Oct. 28, Cash	W. E. DeLarm . . .	100.00
		1292.40

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Balance due Kilbourne & Clark Co. \$42343.17

Seattle, Wash., Feby. 28, 1911.

COLUMBIA RIVER ORCHARDS COMPANY,

to

KILBOURNE & CLARK COMPANY, Engineers.

*Summary of Expense for erecting Pumping Station at Wahluke, Wash.*

Expenses Prior to Nov. 1st. 1910 . . . . . \$42343.17

Nov. 1, Osborne Tremper & Co.

Inv. 10-31 . . . . . 6.25

Nov. 16, McClure & McClure In-

voice . . . . . 35.00

Nov. 30, Abstract on Tacoma

property . . . . . 8.25

Dec. 31, Chas. A. Beil, Inv. 12-31 8.40

1911

Jany. 31, State Bank Sumner, In-

terest . . . . . 50.00

Jany. 31, Recording Deed . . . . . 1.60

Feby. 28, State Bank Sumner, In-

terest . . . . . 30.00

Feby. 28, Mary E. Billings, In-



insurance .....	11.00
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150.50

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\$42,493.67

1910

Dec. 27, Cash .....	350.00
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\$42143.67

(Pencil)

Interest not included in above ECK.

M.

Same as Plaintiffs' Exhibit 135 with the following additions:

Certified correct per records, M. A. McKercher, Auditor. Accounting accepted O. K. The Columbia River Orchards Co. by W. E. DeLarm, Pr. Sept. 27th, 1910.

N.

Letter dated May 23, 1911 to Mr. C. M. Glover, Rock Creek, Oregon, by E. C. Kilbourne.

"Your letter of the 19th received; Will you please send a legal description of the land so that we may see where it lays, also state the improvements that are on the place, what stock and machinery goes with it. We are not in shape to buy the land at present but the parties from whom we bought the Tobey Bros. ranch are anxious to get *anothe* farm on similar terms, therefore if you will write giving me a complete description and inventory as near as pos-

sible we will put it up to the party.

Give the number of acres in Spring and Winter wheat and the kind of wheat that is planted."

O.

Blue prints, showing in detail the plans of the pumping plant and machinery. These Blue prints show a very elaborate and substantial plant fully equipped with all necessary machinery to make a good, substantial and complete pumping plant for the irrigation system, complete in every detail.

P.

Letter dated February 17, 1911, to Pacific Power & Light Co., Portland, Oregon, by Columbia River Orchard Company by W. E. DeLarm, Pres.

"As requested by your Mr. H. S. Wells, we beg to submit the following brief summary of what our company is doing at Wahluke, for which we have this day made a contract with your company for power.

The initial project of our company covers an area of approximately 15,000 acres, lying at two levels, namely; 60 and 115 feet above the Columbia River; of it, about 5,500 acres belong to the N. P. Railway Company and the balance to individual settler, mostly of the latter.

Our company have either mortgages to secure payments for water agreements for furnishing water either now executed or in process of being closed. Lying directly back of the 15,000 acres is another level of approximately 35,000 acres, all of which can be irrigated from our pumping plant.

It is incorporated under the general scheme of the company and for which we have this day contracted for power.

The Company is the owner of approximately 1200 acres of land which they are selling for \$350. per acre including water right and of which there has been sold approximately \$300,000.

Payment for this is made in not less than 20 per cent down and balance in five equal payments.

The Company have already constructed a solid concrete pump house which cost \$49,000 and is now completed. Machinery is procured and will soon be installed.

About fifteen miles of Ditch work has about been completed and there is now about one hundred horses and the necessary quota of men at work on the Ditch.

By May 1st the main Canal will be completed to cover from five to seven thousand acres of land. The present plan for this year contemplates putting the water on only 2,000 acres as this is all the land which will be prepared for cultivation. Additional land will go as fast as users can be secured for water."

Q.

Financial statement Columbia River Orchard Company dated Jan. 27, 1911, and signed by the Company by W. E. DeLarm, Pres. and A. J. Biehl, Secy.

"The Columbia River Orchard Company is a Washington corporation with a capital stock of \$100,000.00 which has been fully paid in mortgages on farms, and the stock is now owned and held by the

Washington Orchard Irrigation and Fruit Company. The Company is essentially a holding company and incurs no liabilities other than the issuance of bonds.

There has been authorized a bond issue which is progressive and is limited in amount to securities amounting to 125 per cent for every \$100 of bonds issued. At present there has *bee* \$74,000.00 of bonds issued.

#### ASSETS—

Mortgages .....	\$100,000.00	
Securities .....	59,000.00	\$159,000.00

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#### LIABILITIES—

Bonds Issued .....	74,000.00	
Accrued Interest .....	1,180.00	
Taxes .....	17.50	75,197.50

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Surplus .....	\$83,802.50
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The mortgages mentioned above are on farm land at \$100.00 per acre, which land is selling for \$350.00 per acre and there are no other mortgages on the above property. In addition to the above security the principal and interest on the bonds of this company is guaranteed by the Washington Orchard Irrigation and Fruit Company.”

#### R.

A printed pamphlet put out by Columbia River Orchards Co. entitled “Modern Alchemy,” illustrations of individual experiences in farm profits, etc.

Also, discusses in detail "Financial View Point," "Soil," "Climate," "Crops," Impossibility of overproduction, markets, irrigation, Irrigation vs. Rainfall, Scientific Farming, Turning the Desert into a Garden, and applies the same to the Company's project at Wahluke and then discusses in detail as to the Wahluke project, location and lay of land, sheltered situation, free from insects and pests, transportation, improvement and development. Pumping Plant, Domestic Water, Electric Light, Fuel, Roads, Water Right, Clearing and Leveling. Developments and Cost, Rapid Increase in value.

The book also contains many pictures of growing crops on irrigated lands, which, however, do not purport to be at Wahluke, showing crops of fruit, hay, grain, irrigating ditches, orchards, cattle, railroads, bridges, steamboats, etc. The whole book being a very flattering and picturesque presentation of the possibilities of the Wahluke project and making it appear very attractive to the investor and home-seeker.

### S.

Another pamphlet similar to Ex. R. but not so elaborate.

### T.

Statement of Cost of Completing Wahluke project. Payments by E. C. and C. A. Kilbourne ac. Columbia River Orchards Co.

Contract.



1911

Apr. 6, J. W. Springston ac.		
Pipe cont. Pd. by C. A.		
K. personal check . . . .	300.00	
Ck to K & C Co. ac.		
Sund bills Pd. by C. A.		
K. personal check . . .	317.62	
Apr. 10, cash for pay roll acct		
Pd by C. A. K. personal		
check . . . . .	500.00	
Apr. 11, Cash to Livingston ac.		
trip Wahluke C. A.		
K. personal check for		
cash . . . . .	50.00	
Draft to Livingston ac.		
Pay, 250 Ex. 75c C. A.		
K. Telegraphic exchg	250.75	
K & C Co ac. Sundry		
bills pd. CAK ck. to		
N. P. Ry. for frt. . . .	136.82	
Apr. 19, Adair & Son, Rumsey		
pump & carburetor		
CAK ck. . . . .	130.09	Deductions
Apr. 22, DeLaval Steam Tur-		
bine Co $\frac{1}{2}$ Kilbourne		
Co. Ck. . . . .	1748.70	1600.00
General Electric Co.		
bal Kilbourne Co. ck.	650.00	650.00
General Electric Co.		
Int. & Storage 3 checks	120.00	

Apr. 24, Deposit 1st Natl Bk.	
Pasco ac pay rolls 3	
checks .....	250.00
K & C Co. ac. sund bills	
3 checks 200. 131.45..	331.45
Apr. 21, Seattle Natl. Bk. Dft.	
CAK ck. ....	281.94
Apr. 28, Alaska Junk Co. pipe,	
tools, etc. K. Co. ck. ..	129.89
Columbia Steamboat	
Co. ac. frt. K. Co. ck.	432.00
May 4, National Grocery Co.	
ac. Klob & Son Camp	
sups. K. Co. ck. ....	154.08
Cash Acct. P. R. &	
Exp. K. Co. ck. to K &	
C. Co. ....	500.00
May 10, Deposit Pasco Bank ac.	
P. R. K Co. ck. ....	1250.00
May 20, Deposit Pasco Bank ac.	
P. R. K. Co. ck. ....	1000.00
May 22, J. W. Springston ac	
frt. mtl K. Co. Ck. 81	
CK 100 in cash 5-4 ...	181.00
May 24, John Burns K. C. ck...	2.00
Hoskins Machine Wks	
K. Co. ck. ....	49.53
Columbia Steamboat	
Co. K. Co. Ck .....	77.39
May 27, Pasco Bank ac. Living-	

	ston & Expense . . . . .	200.00
June 5,	Natl. Grocery Co. . . . .	0000.
	Richmond L. Sacks, (K. Co. Ck.) . . . . .	5.75
	D. Chambers (K. Co. Ck.) . . . . .	16.12
	H. H. Haven, horse hire (K. Co. Ck.) . . .	5.95
	G. Jaadden, ferry man (K. Co. Ck.) . . . . .	8.50
	Ashbaugh & Co. Ken- newick (K. Co. Ck.) . .	60.00
	F. C. Koppen, Wah- luke groceries K. Co. Ck. . . . .	169.90
	Kennewick Hardware Co. (K. Co. Ck.) . . .	63.00
June 8,	J. D. Montgomery, team (K. Co. Ck.) . . .	6.90
	Co-operative Orchard Co. Distalate potatoes, etc. (K. Co. Ck.) . . .	67.33
June 22,	Columbia Steamboat Co. frt. (K. Co. Ck.) .	126.15
June 23,	Standard Oil Co. gas- olene (K. Co. Ck.) . . .	88.20
June 29,	Dep. Pasco Bank ac. P. R. & Expense K. Co. Ck.) . . . . .	1069.80
July 3,	J. H. Fox, camp sup-	

	plies (K. Co. Ck.) ...	62.20	
	National Grocery Co.		
	ac. Klob K. co. ck. ...	111.55	
July 27,	P. S. Bdge & Ddg Co.		
	ac. Int. & Atty fees..	2500.00	
	E. C & C A K Ck ....		1500.00
July 15,	Use of Gas. Engine & pumping outfit Jour- nal entry .....	150.00	
	Bot. of Herr Eng Co.		
	600.00 & pump .....		
July 18,	1st Nat. Bk. Pasco 3 dks. (ck. Kil. Co) ...	13.50	
	J. Schwartz Labor. watchman 70 cash		
	39.10 ck. ....	109.10	
Aug. 4,	F. C. Koppen, ac gro- ceries ck. Kil. Co. ....	200.00	
	St. Paul & Tacoma Lumber Co. Kenne- wick, Cil. Co. Ck. ...	187.14	
	DeLaval Turbine Co. Int. Storage & frt. (K & C. Checks) .....	235.67	
	Kennewick Produce Co. (K. Co. Ck.) ....	6.90	
Aug. 23,	National Grocery Co. on ac. Kolb (K. Co. Ck.) .....	100.00	
	Jay Locks 2000 sacks		

	for coffer dam 3 cks.	
	50, 25, 25, .....	100.00
Aug. 31,	Gray & Barash Elec- trical work, letter ...	175.00
	Woodhouse & Platt pd 4-18 Pd. by E C & CAK ck .....	26.00
	K & C. Co., for sundry bills K. Co. ck. ....	500.00
	Switch board & Instru- ments complete K & C Mfg. Co. acct offset ..	420.00
	K C Mnfg Co. Motor & primer Pr. by E S & CAK in rent .....	250.00
Oct. 25,	Mrs. J. W. Springston ac. Pipe contract (E. C. & C. A. K.) .....	272.56
Oct. 27,	Kennewick Hdw. Co. (check missing) ....	126.70
	Kennewick Packing Co. (should be 168.91)	118.00
Nov. 16,	S. P. & Tac. Lbr. Co. on ac. (E C & CAK) ..	50.00
Nov. 20,	Shonet & McLaren (EC & CAK) .....	50.00
Nov. 30,	J. W. Shepard bal. (Cert. Ck.) .....	239.70
Nov. 30,	7-7 A. Hambach Co (K & C Check) .....	146.17



	Hydraulic Supply Co	
	(K & C) .....	50.00
	Salary and Exp. of	
	Managing Engineer	
	(K & C ck pd. 5-22-12)	1000.00
Nov. 23,	P. C. Leonard Lumber	
	Co. ac. Springston	
	(CAK per ck) .....	537.05
Dec. 10,	P. C. Leonard Lumber	
	Co. balance (Ck 100.45,	
	330 bal ck. missing) ..	430.00
1912		
January	Springston note acct.	
	pipe cont. ....	225.00
	29, (EC & CAK Ck.) Int .	4.70
Feb. 5,	Sampson Iron Wks (Dft.	
	Natl. Bk. Com) .....	78.69
	St. P & Tac. Lbr. Co.	
	bal (See Invoice .....	162.00
Feb. 12,	Standard Oil Co. (50	
	ck. missing, 62.45 ck.	
	No.531, 2 cks) .....	112.45
	A. C. Weaver Asst.	
	Eng. bal. saly (K & C)	70.50
Sept. 3-12,	Springston note bal	
	ac. (131 pd by EC &	
	CAK, 101.65 by M. L.	
	Co) .....	231.65
		<hr/>
		19788.89

Less deduction acct K &amp; C. Co.

items .....	3750.00
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Add for overhead exp. &amp; 16038.89

profit 10 per cent ...	1603.88
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\$17642.77

E &amp; O. E.

U.

Bundle of checks showing payments by checks as  
noted in Ex. T.

V.

## THE KILBOURNE RANCH.

EARNINGS AND EXPENSES FOR TWO  
YEARS ENDING MARCH 1, 1913.

## Receipts—

	March 1, 1912	March 1, 1913
From sales of grain .....	3,516.84	27,913.23
From grain remaining on hand.		1,289.90
Feed and seed remaining on hand		339.30

Ledger totals .....	3,516.84	29,551.43
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## Expenses—

Wages paid .....	3,972.48	9,832.26
commissary supplies .....	1,535.76	667.72
Fuel oil for traction engine ....	599.00	2,058.16
Lubricating Oil .....	496.59	861.23
Seed and Feed bought .....	615.91	144.45
Grain sacks .....	333.35	2,272.30

Building and general repairs . . .	47.16	347.51
Machy & Implement repairs . . .	1,006.36	1,891.70
Engine Repairs . . . . .	1,612.59	2,175.06
Miscellaneous expenses . . . . .	1,129.92	1,421.42
Taxes & Insurance . . . . .	70.00	676.49
Interest . . . . .	1,329.33	3,578.11

Total expenses as per ledger . . .	12,748.45	25,926.41
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Add Depreciation

Building 5 per cent

Engines 15 per cent . . . . .	1,806.70	2,538.92
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Other machy & Implements

12½ per cent, Livestock 8 per  
cent . . . . .

	14,555.15	28,465.33
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DEDUCTIONS—

To arrive at cost of operation of  
original Tobey Bros. ranch,  
deduct the following items:

Interest )not necessarily . . . . .	1,329.33	3,778.11
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Misc. Expenses a part of (part)

operation expense . . . . .	600.00	1,000.00
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Plowing and cultivating lands

other than the Tobey included

in above exp. 1913. . . . .		3,325.80
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Total deductions . . . . .	1,929.33	8,103.91
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Actual cost Tobey land only . . .	12,625.82	20,361.42
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Loss 1912; profit 1913 . . . . .	9,108.98	9,190.01
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	12,625.82	29,551.43
--	-----------	-----------

Added to equipment during two years.

Buildings constructed .....	2,243.82
Traction Engines .....	4,279.97
Machy and implements .....	1,775.00
Livestock purchased .....	5,028.31

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Total .....	13,327.10
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	Year	Year
	1911	1912
No. acres in grain .....	1900	3000
(Produced) .....	10200	47000
No. Bushels produced.....		
(Sold) .....	4688	42000
Average yield per acre .....	51¼	15 2-5
Average price per bushel .....	74½	70
Cost to produce per bushel .....	2.90	48½
Cost of operation per acre in crop	6.64	6.78
Gross income per acre in crop ..	1.83	9.85
Gross income per acre entire		
ranch .....	.80	6.80
Net gain for year ending 3-1-13 .....		\$9,190.01
Net loss for year ending 3-1-13.....		9,108.98

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Net profits for 2 years of 81.02 on an investment of about \$75,000.

W.

Seattle, Washington, January 25, 1912.

The Columbia River Orchard Company,

Seattle, Washington.

Gentlemen:

Upon the payment to us within ninety (90) days from this date of the sum of seventy-five hundred dollars (\$7500) with interest thereon at the rate of six per cent per annum from September 19, 1911, together with costs in a certain action now pending in Grant County, State of Washington, in which Puget Sound Bridge & Dredging Company is plaintiff and Kilbourne & *Blark* Company and the Columbia River Orchard Company are defendants, which costs are to include an attorney's fee in the sum of one thousand dollars (\$1,000), and also the further payment of the sum of twenty-seven hundred dollars (\$2700), all to be paid in cash, we hereby agree to satisfy and have cancelled of record that certain lien, suit for the foreclosure of which is now pending in said Grant County in the case hereinbefore referred to, and we also agree to pay off and have cancelled of record the note and mortgage given to the Moran Company by us, on the Johnson property in Tacoma, and to cause to have deeded to the Columbia River Orchard Company, or its assigns, both the said Johnson property and the Billings property, subject to the mortgages on said property at the time we acquired the same, together with interest, taxes and insurance now due or accrued. It is agreed that the performance of the



above agreements will settle all matters in full between us. Accepted Jan. 25, 1912.

THE KILBOURNE & CLARK COMPANY,

By E. C. K.

January 25, 1912.

Kilbourne & Clark Company,

Seattle, Washington.

Gentlemen:

Pursuant to agreement and understanding reached this day in the matter of the case of Puget Sound Bridge & Dredging Company vs. Columbia River Orchard Company and Kilbourne & Clark Company, pending in Grant County, Washington, the Puget Sound Bridge & Dredging Company agrees that on receipt from you at any time within ninety (90) days from this date of the sum of seventy-five hundred dollars (\$7,500) in cash, together with interest thereon at the rate of six per cent from the 19th day of September, 1911, together with the costs of said suit, including an attorney's fee in the sum of one thousand dollars (\$1,000), the Puget Sound Bridge & Dredging Company will assign to you its lien filed in the cause, together with any judgment rendered and entered thereon and all its rights therein.

Yours very truly

PUGET SOUND BRIDGE & DREDGING COMPANY,

By R. M. Dyer, *Vic* President.

George L. Spirk, Secretary.

Approved Nov. 4, 1914.

R. S. BEAN, Judge.

And Afterwards, to wit, on the 2 day of October, 1914, there was duly filed in said Court and cause a praecipe, in words and figures as follows, to wit:

**[This Proecipe]**

*In the District Court of the United States for the  
District of Oregon.*

FRANK L. TOBEY and RETTA M. TOBEY, his  
wife, AUGUSTA M. TOBEY, and WILLIAM L.  
TOBEY,

Complainants,

vs.

W. E. DeLARM, EDWARD C. KILBOURNE,  
CHARLES A. KILBOURNE, J. ALEXANDER  
WAKEFIELD, CYRUS F. CLAPP, H. E.  
LUTZ, W. J. BURNS, The EDINBURG and PA-  
CIFIC COAST MORTGAGE AGENCY, LIM-  
ITED, COLUMBIA RIVER ORCHARD COM-  
PANY, a corporation, OREGON-WASHING-  
TON TRUST COMPANY, of Portland, Oregon,  
Trustee, a corporation, and the WASHINGTON  
ORCHARD IRRIGATION AND FRUIT COM-  
PANY, a corporation,

Defendants.

To G. H. Marsh, Clerk of the District Court of the  
United States for the District of Oregon:

You are hereby directed to incorporate the follow-  
ing named documents in the record on appeal in the  
above entitled cause:

1. Bill of Complaint.
2. Appearance of attorneys for said defendants

Edward C. Kilbourne and Charles A. Kilbourne.

3. Amended answer of said Edward C. Kilbourne and Charles A. Kilbourne.

4. Final decree.

5. Memorandum on the merits. Opinion.

6. Petition for allowance of appeal.

7. Order allowing appeal.

8. Assignment of error.

9. Notice of appeal, with acknowledgment of service thereon.

10. Abstract of evidence.

11. This praecipe.

12. Undertaking on appeal.

Respectfully submitted,  
WOODCOCK, SMITH & BRYSON,  
WILLIAMS & BEAN,

Attorneys for Appellants.

United States  
Circuit Court of Appeals

For the Ninth Circuit

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Appellant's Brief

---

FRANK L. TOBEY and RETTA M. TOBEY,  
His Wife, AUGUSTA M. TOBEY and  
WILLIAM L. TOBEY,

Appellants,

vs.

EDWARD C. KILBOURNE et al.,

Appellees.

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Appeal from the United States District Court for the  
District of Oregon

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Filed

JAN 26 1915

F. D. Moulton,

Attorney for Appellants.

A. C. WOODCOCK,  
E. R. BRYSON,  
R. S. SMITH,  
JOHN M. WILLIAMS,  
LOUIS E. BEAN,  
Attorneys for Appellants.





United States  
Circuit Court of Appeals  
For the Ninth Circuit

---

Appellant's Brief

---

FRANK L. TOBEY and RETTA M. TOBEY,  
His Wife, AUGUSTA M. TOBEY and  
WILLIAM L. TOBEY,

Appellants,

vs.

EDWARD C. KILBOURNE et al.,

Appellees.

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STATEMENT OF THE CASE

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HISTORY OF THE WAHLUKE PROJECT

The Wahluke project, so-called, lies in Grant County, Washington, along the Columbia River, and consists of an irrigation scheme to irrigate the lands lying within the project. The project as originally

contemplated consisted of a pumping plant and irrigation ditches for the purpose of irrigating some seven or eight thousand acres of land. This land was some eighty feet above the Columbia River, and lay in a bench surrounded by higher land above it, and this bench it was contemplated to irrigate practically the whole thereof by two systems of ditches. The first one, as aforesaid, embracing six or eight thousand acres of land, and the upper ditches embracing practically all the remaining part of the bench. No attempt has ever been made to construct more than the first irrigation ditch. A company was organized in 1907 by H. H. Humphreys and George W. Armstrong, for the purpose of irrigating this land. The authorized capital stock was one hundred thousand dollars. After frittering away this stock, another corporation was organized with a capital stock of five hundred thousand dollars, small tract of land purchased and a townsite laid out, called Wahu-luke. After frittering away most of the stock of this corporation, the project was taken over by W. E. DeLarm and A. J. Biehl, they getting possession of the stock of the second corporation. In January, 1910, a contract was entered into with Kilbourne & Clark Company, of Seattle, Washington, for the construction of the pumping plant, and work was begun by them upon this plant and continued until July, 1910; at that time practically nothing having been paid to the construction company, they suspended work.

At this time the Kilbourne & Clark Company claimed that the Columbia River Orchard Company, represented by DeLarm and Biehl, owed them some forty-three thousand dollars. To relieve the situation, DeLarm and Biehl issued bonds of this company to the amount of sixty-two thousand dollars, and fifty-nine thousand dollars were traded off for property of various kinds. This situation continued down to the latter part of 1910, and early in 1911 when DeLarm and Biehl conceived the idea of issuing an unlimited quantity of bonds.

The land within the project was owned partly by private individuals, and partly by the Northern Pacific Railroad Company, and partly by the Government of the United States. Some persons had settled upon the Government land, and had filed desert land entries thereon. In the scheme of irrigating this land it was proposed that these desert land owners should enter into a mortgage with the Columbia River Orchard Company, whereby they were to pay one hundred dollars an acre for water placed upon the desert land claims, and a mortgage was given to secure the same upon the desert land entries. The scheme entered into by DeLarm and Biehl, was to place these desert land mortgages with a Trust Company, and the Trust Company to handle the bonds. For the first fifty-nine thousand dollars of 8 per cent bonds put out in 1910, a Seattle Company was trustee, and held a few of these desert land mortgages

to secure the payment of the bonds. This Seattle corporation was consolidated with a banking corporation in Seattle, and a new trust officer appointed for the trust department, and finding this trust agreement with the Columbia River Orchard Company, together with the desert land mortgages among the effects of the old Trust Company, the trust officer investigated the matter and immediately filed a resignation as such trust officer with the Columbia River Orchard Company. DeLarm and Biehl then organized the Oregon and Washington Trust Company, of Portland, to take over this trust agreement and to handle the bonds. This trust company had a capital stock of fifty thousand dollars, and was taken by A. J. Biehl, W. E. DeLarm, G. C. Hodges, H. H. Humphrey, and E. J. Brazell, and the trust company organized.

And at the same time, or about the same time, a new corporation was organized known as the Washington Orchard Irrigation and Fruit Company, to take over the Wahluke Project, DeLarm and Biehl being the principal manipulators of the whole concern. The bonds were to run to the Oregon and Washington Trust Company, and to be guaranteed by the Washington Orchard Irrigation and Fruit Company, and signed by the Columbia River Orchard Company.

Equipped with this outfit of corporations and trust agreements and the bonds, DeLarm and Biehl commenced to issue large quantities of bonds either late

in 1910 or early in 1911, and trading bonds for property and up to the first of March as near as can be ascertained, they had outstanding some three or four hundred thousand dollars of these bonds so guaranteed by the Washington Orchard Irrigation and Fruit Company and backed by the security of some of these water mortgages.

Some time prior to this DeLarm and Biehl, or some of their corporations, had entered into a contract with the State of Washington for the purchase of the East Half of Section 16, Township 14 North, Range 26 East, Willamette Meridian, within the Wahluke Project, and also had entered into a contract with a real estate firm of the name of Maltby & Pearl and other parties for the purchase of Section 20, same township and range, and they had conceived the scheme of subdividing these tracts into five and ten acre tracts and selling the same to various parties for \$350.00 an acre, with the promise of putting water upon the same. They had made either one or two payments on the half of Section 16 and a small payment on Section 20, amounting to approximately five or six thousand dollars. The purchase price of Section 20 was one hundred dollars an acre, sixty-four thousand dollars for the section. They conceived the idea of placing these contracts also with the Trust Company as a guarantee behind the bonds to the extent of 125 per cent of the bonds issued.



## HISTORY OF TOBEY CONTRACT

The plaintiffs herein were the owners of a wheat ranch in Gilliam County, Oregon, consisting of 4,350 acres, together with a full equipment of farm tools, implements, machinery, horses, mules, etc., for operating the same.

Wishing to dispose of the same, they listed it with a real estate broker in Portland, Oregon, for sale at \$25.00 per acre (p. 92 Record Test. W. L. Tobey). A few days afterward a real estate agent called them up and proposed a deal for Columbia River Orchard Co. bonds. After some talk with the various people who represented the Orchard Co., they entered into an agreement to trade the ranch and its equipment for \$120,000 in Columbia River Orchard Co. bonds.

W. E. DeLarm, who was the leading spirit in the Columbia River Orchard Co., and its kindred associations, arranged with W. L. Tobey to visit the ranch with a friend who was an expert in agricultural lands. At the time appointed, DeLarm, with Edward C. Kilbourne, one of the respondents, appeared and in company with W. L. Tobey visited and inspected the ranch. W. L. Tobey, after this visit to the ranch, went to Seattle, in an attempt to investigate the bonds. At Seattle, he talked with various parties suggested to him by DeLarm, among them was A. C. Gunn and from Mr. Gunn he got the idea that if the securities behind the bonds had to be sold to pay the bonds, they would pay out about eighty

per cent. On his return to Portland, he turned down the contract already entered into, as it contained a provision that the Tobeys were to be satisfied with the bonds.

Further negotiations were had, and finally on March 4, 1911, a new contract was entered into (Exhibit A to the Bill, Page 24, Record) whereby the Tobeys were to get Columbia River Orchard Co. bonds to the face value of \$140,000.00 for the ranch and its equipment. The full consideration was \$141,000.00. Of this sum \$1,000.00 was to be in cash to pay for supplies at the ranch then on hand. (Test. W. L. Tobey, p. 101 Record).

On March 4, 1911, the parties met in Portland and the deeds to the land were made out, and at that time, at the request of DeLarm, the deeds were made to run to Edward C. Kilbourne, respondent herein.

Edward C. Kilbourne and Charles A. Kilbourne, the respondents, were principal stockholders in the Kilbourne-Clarke Co., the contracting engineers of the pumping plant at Wahluke.

The deeds were placed in escrow until the 24th of March, 1911, and were then delivered to the parties. Within a day or two after the delivery of the deeds to Edward C. Kilbourne, he executed a deed to the property to respondent Charles A. Kilbourne, and both the Kilbournes now claim to own the property.

## ISSUES IN THE CASE

In the negotiations between the Tobeyes and DeLarm, it was represented to the Tobeyes that the bonds were secured by mortgages held by the Trust Co., to the value of 125 per cent of the bonds issued, and that in addition to this the bonds were secured by land contracts upon which there was due 125 per cent of the bonds issued.

It was also represented to the Tobeyes that the Company owned some 4,000 acres of land within the project, and had options on about 10,000 acres of railroad lands within the project. (W. L. Tobey, pp. 93-95, 116-117, F. L. Tobey, Record, pp. 336-338).

These representations, it is claimed in the bill, were false, that DeLarm knew them to be false and that they were falsely and fraudulently made for the purpose of cheating and defrauding the Tobeyes out of their land; that they relied upon these representations being true and that on account thereof they believed that the bonds were well secured and that the Washington Orchard Irrigation and Fruit Company were amply able to back up its guaranty on the bonds. That relying upon these representations and believing them to be true they made the deeds described in the bill and were thereby cheated and defrauded out of their lands and equipment. They also claim that Edward C. Kilbourne and Charles A. Kilbourne were parties to this fraud and had knowledge thereof.

The Kilbournes claim in their answer that there was no fraud, and if there was they had no knowledge or notice thereof, and that they paid a valuable consideration therefor, and were therefore innocent purchasers for value without notice.

The Court, in the memorandum on the merits, found there was fraud in the transactions as alleged, but held that the Kilbournes were innocent purchasers for value without notice.

## ERRORS ON APPEAL

The errors contended for on appeal are:

### I

The Court did not find that fraud was committed as alleged in the Bill, and as set out in the foregoing statement.

### II

The Court did not find that Edward C. Kilbourne and Charles A. Kilbourne were connected with the fraud and had guilty knowledge thereof.

### III

The Court erred in finding that Edward C. Kilbourne and Charles A. Kilbourne were innocent purchasers for value without notice at the time the deeds

to the land were executed and turned over to Edward C. Kilbourne.

#### IV

The Court erred in finding that Edward C. Kilbourne and Charles A. Kilbourne had no knowledge of the fraud at the time they paid DeLarm the \$10,000.00 in September, 1911.

#### V

The Court erred in not granting the complainants the relief prayed for in the Bill of Complaint.

#### VI

The Court erred in dismissing plaintiffs' Bill of Complaint and in giving judgment against them for costs and disbursements of suit.

### POINTS ON LAW

#### I

The false representations made in this case were such as the plaintiffs were under the circumstances entitled to rely upon.

Crane vs. Elder, 29 Pac. 151.

Proger vs. Old Nat'l Bank, 56 Pac. 391.

"In selling stock in a corporation representations that the company is not in debt and is making prof-



its of a certain specified amount which are untrue are fraudulent. *Redding vs. Wright*, 49 Minn. 322. In such a case the person to whom made is not required to obtain information from other sources, even if readily accessible. *Faribault vs. Sater*, 13 Minn. 223; *Kiefer vs. Rogers*, 19 Minn. 32; *Burr vs. Willson*, 22 Minn. 206; *Porter vs. Fletcher*, 25 Minn. 493; *Olson vs. Orton*, 28 Minn. 36; *Maxfield vs. Schwartz*, 45 Minn. 150; and he is under no obligation to investigate and verify statements, to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith. *Mead vs. Bunn*, 32 N. Y. 275, at p. 280."

Cited in *Smith on Laws of Fraud*, Sec. 6 C. P. 76.

## II

"It is not necessary that the defendants' false representations should have been the sole cause, or even the principal inducement for the plaintiff to enter into the contract. If it exerted a material influence upon his mind, although it was only one of several motives acting together which produced the result, the defendant would be liable."

*Smith on Laws of Frauds*, Sec. 51 (i) p. 83.

*Sioux Nat'l Bank vs. Norfolk*, 56 Fed. 139.

## III

One who purchases merely an equity cannot be a bona fide purchaser. The doctrine of bona fide purchaser is not applicable to the purchase of an equity.

2 Warvell on Venders (2nd Ed.) 708.

York vs. McNutt, 16 Tex. 13; 73 Am. Sec. 607.

Butler vs. Douglas, 3 Fed. 613-14.

Latham vs. Barney, 14 Fed. 446.

Wallterton vs. Snow, 15 Fed. 404.

Vattier vs. Hinds, 8 L. Ed. 682.

Boone vs. Chiles, 9 L. Ed. 399-400; 35 U. S.; 10 Pet. 211.

Smith vs. Orton, 18 L. Ed. 64.

Bonelli vs. Burton, 61 Ore. 429.

This rule was recognized by the lower Court in the memorandum on merits, p. 74, but held that the Kilbournes did not purchase the equitable but the legal title.

## IV

Where under or by virtue of the assignment of a contract or option procured by fraud or by direction of the defrauding party, the deed is made direct to a third person, such third person will not stand in any other or better situation than the defrauding

party, and cannot be regarded as an innocent purchaser.

Torey vs. Buck et al, 2 N. J. Equity 366.

Seibel vs. Higham (Mo.), 115 S. W. 987; 129 A. St. Rep. 510-11.

Bonelli vs. Burton, 61 Ore. 429.

In Torey vs. Buck the deed was made direct by the defrauded party to an innocent third person at the instance of the defrauding party, the innocent third party paying full consideration therefor to the defrauding party, and taking the title in good faith and without notice of fraud.

We have not the case before us to quote from, but the Court held unequivocally that since the deed was made direct and in consequence of the fraud perpetrated by Buck, the defrauding party, Hamilton would not stand in any other or better situation than would Buck had the deed been made to him, and that his relation to the transaction was such that he could not occupy the position of an innocent purchaser, although the Court found he took the title in good faith, for value without notice.

In Seibel vs. Higham, the facts briefly were that Higham and Myer had by fraud acquired title to the lands in controversy. They gave an option to Graham to purchase for \$2,200.00, for which option Graham paid \$200.00 down. Graham had knowledge sufficient to taint his option. Graham procured Bar-

nard to purchase under his option, Barnard paying value and being innocent of any knowledge. We quote that portion of the decision material upon this question:

“3. Is the defendant corporation that now holds the title an innocent purchaser? Whatever right it has to that distinction is derived from Mr. Barnard; the deeds from Barnard to Mrs. Scoble and from her to the defendant corporation were without consideration, and were designed only to pass to the corporation the title which Barnard acquired from Meyer.

“After Higham had acquired possession of the escrow and had obtained from Douglas and Thompson the quitclaim deed to Meyer and had put both instruments on record, he and Meyer undertook to find a purchaser for the property and at last negotiated an option to Graham for \$2,200.00, for which option Graham paid \$200.00 down—that is, he paid that much of the proposed purchase money, to be forfeited if he should fail to pay the balance. He let the period of his option pass without exercising it, then he asked for an extension, which after some negotiations was finally agreed to, and the right to purchase at that price was extended ten days. During that extended period he induced Barnard to buy the property at the option price. In his testimony, referring to Mr. Graham, Mr. Barnard said: ‘He

(Graham) paid \$200.00 on this option, and I paid him that back; I was not continuing the option, I was buying the property.' And Mr. Graham testified: 'I claim that Mr. Barnard purchased that altogether independent with my rights in the premises and he simply repaid me or made me good for what I paid on account.' These quotations from their testimony are made to show that they both tried to convey the idea that Barnard's purchase was independent of Graham's option, but that is only their opinion of the legal effect of the transaction; the facts do not justify the opinion. The facts are that after Graham obtained the extension, and within the extension, he approached Barnard and solicited him to advance the money to purchase on the terms of the option, and within that extension Barnard closed the transaction by paying Meyer \$2,000.00 and Graham \$200.00 he had paid on the option. Barnard testified that when Graham spoke to him about buying the property he told him he had an option on it, and showed him the paper; it was signed by Meyer; Graham testified, 'When this option was finally closed out, the title to the property was taken in the name of Barnard.' Graham had the right, under his option, to buy the property by paying \$2,000.00 in addition to the \$200.00 he had already paid, and at the closing of the transaction he was there prepared, with the help of Barnard, to exercise that right of purchase at that price, and he did exercise



it, directing the deed to be executed to Barnard instead of himself. Whether Barnard could at that time have bought the property for that price, if Graham had not had the option, we do not know; we only know that with the option he did obtain the property by paying \$200.00 to Graham and \$2,000.00 to Meyer, and that he availed himself of the Graham option in the transaction to get the property at that price. That put him in Graham's shoes. When Graham bought his option he knew that Meyer held the title in trust for himself, Higham, Seibel and the Boepple heirs or devisees, as their respective interests might appear, and he also knew that Seibel and Mrs. Boepple were not consenting to the sale to him. If Graham had first concluded his purchase and had placed his deed on record and had afterward negotiated an independent sale to Barnard, who had bought knowing nothing except what the record showed, we would have had a different case. Under the circumstances of this case we hold that Barnard was not an innocent purchaser. In fact, instead of being an innocent purchaser, he and Graham are rather in the attitude of conspiring with Meyer and Higham to wrong Seibel and the Boepple heirs."

In *Bonelli vs. Burton*, our own Court has gone even a step further and held that where the rights of the alleged bona fide purchaser were initiated by taking assignment of a contract procured by fraud, he would

take charge with notice of the fraud, although afterwards in consequence of his payment of the purchase price to the original vendor the deed deposited in escrow under the terms of the agreement were delivered and a deed obtained from the grantee, the defrauding party, to the alleged bona fide purchaser. To understand the full effect of this case it must be borne in mind that Burton was in all respects, except in the manner in which he acquired his title, a bona fide purchaser for value and without notice. In this case the Court says:

“This contract created only an equity, the transfer of which did not make Burton an innocent purchaser, or give him any right to the premises superior to that possessed by the assignor. Kerr, *Frauds*, 321. In *Boone vs. Chiles*, 10 Pet. 177, 209 (9 L. Ed. 388) Mr. Justice Baldwin, discussing this subject, says: ‘A purchaser with notice may protect himself under a purchaser by deed without notice, but cannot do it by purchase from one who holds claim by contract only. The cases are wholly distinct. In the former the purchaser with notice is protected; in the latter, he has no standing in equity, for an obvious reason—that the plaintiff’s elder equity shall prevail unless the defendant can shelter himself under the legal title acquired by one whose conscience was not effected with fraud or notice, and who can impart his immunity to a guilty purchaser, as the representative of his legal rights, fairly acquired by

deed, in such a manner as exempts him from the jurisdiction of a court of equity. Such a purchaser affixes no stain upon the conscience, and equity cannot disturb the legal title. But, as it does not pass by a contract of purchase without deed the defendant can acquire only an equity, the transfer of which does not absolve him from the consequences of his first fraudulent purchase.”

The lower Court, in the memorandum on the merits, held that this case did not apply in the following language:

“In *Bonelli vs. Burton*, (61 Or. 429), the defense of innocent purchaser for value was not made or considered.”

But the language above used by the Supreme Court of Oregon laid down the law applicable by way of argument and in effect held that had the defense of innocent purchaser for value been pleaded and raised in the case, it would not have availed the defendant, for the reason that his purchase was that of an equity and therefore he took with notice.

## V

Where fraud is proved and the defendant relies upon a defense that he is a bona fide purchaser, he must allege and prove that he was a bona fide purchaser, for a valuable consideration paid without notice of a fraud, or of such facts as would put a rea-

sonably prudent man upon inquiry and the burden is on him to prove it.

6 Ency. of Ed. 14-16.

2 Pomeroy's Eq. Jur. Sec. 785.

Salisbury vs. Barton, 66 Pac. 619.

Boone vs. Chiles, 9 L. Ed. 399-400. 10 Pet. 211.

Weber vs. Rothchild, 15 Or. 389-91.

Hyland vs. Hyland, 19 Or. 55.

Simpkins vs. Windsor, 21 Or. 386.

Starr vs. Stevenson, 60 N. W. 219, Par. 5.

Whiteker Iron Co. vs. Pres. Nat'l Bank, 59 N. W. 396, Par. 2.

Neff vs. Landis, 1 Atl. R. 177, Pa.

In Weber vs. Rothchild, 15 Or., at page 390, the Court says:

And this brings us to the examination of a very important question in this case, and that is this: Is the plaintiff required to prove a negative, by showing that the defendant did not pay a valuable consideration, or, having shown the fraudulent intent and purpose of the grantor, may he stop and require the grantee to prove that he paid value, in order to protect his title? Here the defendant Rothchild has alleged facts in one part of his answer tending to show that he is a *bona fide* purchaser for value without notice of this property, but he has offered no evidence

whatever on those issues. The plea of a *bona fide* purchaser for value as here alleged is an affirmative defense interposed by the defendant, and in this connection it is not perceived that it differed from other affirmative defenses. The party having the affirmative of the issue must offer evidence to support it.”

## VI

Notice of facts sufficient to put a reasonably prudent man on inquiry is sufficient.

60 N. W. 220, Par. 6, *Starr vs. Stevenson*.

*Tiedemann on Sales*, Sec. 329.

13 Ency. of Ed. 909.

“It has generally been held that where one purchases or obtains possession of property from a fraudulent vendee, the burden is upon him to show that he is a *bona fide* purchaser in good faith for a valuable consideration and without notice. This is the rule that has been adopted in this state. *Dry Goods Co. vs. Kahn*, 53 Kan. 276; 36 Pac. 327; *Waffer vs. Bank*, 46 Kan. 611; 26 Pac. 1032. Mr. Tiedemann, in speaking on this subject, says: ‘Section 329. That the purchaser must take the goods in good faith and without notice of the defect in the vendor’s title. But not only must he be without knowledge of the defect, but he must not even know facts which are calculated to arouse the suspicion of a reasonably prudent man that everything was not right. . . .’



The burden of proof is upon the party who claims the protection of a bona fide purchaser.' ”

Cited from *Salisbury vs. Barton*, 66 Pac. 619.

*Conn. Mut. Life Ins. Co. vs. Smith.* (Mo.)

38 Am. St. Rep. 666.

*Balfour vs. Parkinson*, 84 Fed. 860, 1.

“Notice of the fact was of such a nature as ought to have put an ordinarily prudent man on inquiry, and in such case a failure to make inquiry is visited with all of the consequences of actual notice. (*Mier vs. Blume*, 80 Mo. 179.)”

Cited in *Wood vs. Rayburn*, 18 Or. 18.

*Hyland vs. Hyland*, 19 Or. 57.

## VII

The burden is upon such a defendant to prove payment in full before notice.

*Johnson vs. Georgia Trust Co.*, 141 Fed. 593.

*Balfour vs. Parkinson*, 84 Fed. 859, 60.

*Boones vs. Chiles*, 9 L. Ed. 400.

*Smith vs. Orton*, 18 L. Ed. 64.

*Wood vs. Rayburn*, 18 Or. 20.

*Hyland vs. Hyland*, 19 Or. 55.

## VIII

One who takes as security of, or in payment of a

pre-existing indebtedness, does not take for a good consideration.

35 Cyc. 353.

2 Pomeroy's Eq. Jur. Secs. 748-9.

Western Grocer Co. vs. Alleman (Kans.)

106 Pac. 460, 135 Am. St. Rep. 398.

Temple vs. Osburn, 55 Or. 510.

## IX

To be a bona fide purchaser, one must come into equity with absolutely clean hands.

Schneider vs. Sellers, (Tex.), 81 S. W. 129.

2 Pomeroy's Eq. Jur. 762.

## X

Contradictory or misleading statements and inadequacy of consideration are badges of fraud which suggest bad faith or knowledge.

Biglow on Fraudulent Conveyances (Rev. Ed.), Chapter XVII.

His statement to the receiver that he had never loaned Davis money on any former occasion is proved to have been untrue by his own admission under oath. A false statement is always suggestive of fraud. He knew that Davis was being pressed by his creditors, and was urgent to secure money by pledging goods, which he knew were not paid for. The large quantity of goods, the place of their depos-

it, the defacing of all marks from the original packages, the pretense of Davis that he had engaged a large storeroom, which he had failed to secure, the transfer of nearly \$40,000 worth of goods on such terms as precluded their redemption, and the failure to make any inquiry, are a few of the circumstances, calculated to create a strong doubt of the integrity of the transaction between Davis and Peabody. "They threw on Peabody the duty of making a full explanation, and the burden of proof to sustain it." *Clements vs. Moore*, 6 Wall, 299, 315; *Piddock vs. Brown*, 3 P. Wms. 289; *Wharton vs. May*, 5 Vs. 49; *Zook vs. Simmonson*, 72 Ind. 83. He has wholly failed to produce any evidence to relieve the transaction of the strong doubts of its integrity which surround it. The title of his pledgor was fraudulent and violable, and, if Peabody is to be permitted to defeat the prior rights of the parties defrauded by Davis, it can only be done when on the whole evidence it is made to appear that he was a bona fide purchaser for value. If, on the whole case, strong doubts of the integrity of the transaction exist, the prior rights of Davis' creditors will prevail.

Cited in *Morrow Shoe Co. vs. N. E. Shoe Co.*, 57 Fed. 697.

24 L. R. A. 424.

*Clement vs. Moore*, 6 Wall, 299-18, L. Ed. 786.

6 Ency. of Ed. 143.

13 Ency. of Ed. 906.

“The price alleged to have been paid was so entirely inadequate as to have put a prudent man on inquiry.”

Cited in 15 Or., *Weber vs. Rothchild*, p. 389.

“Good faith cannot be predicated upon want of knowledge resulting from the evasion of a plain duty. A man cannot shut his eyes to the light of day, and say he is without knowledge that the sun is shining.”

Cited in *Bowman vs. Metzger*, 27 Or. 31.

“The situation must not be judged from the mere statement of witnesses. Very few cases can be found in the books where the fraudulent designs of parties have been defeated that could not have been decided the other way if the court had depended alone upon the statements of interested parties. Fraud seldom works in daylight. Its ways are hidden and secret. It is usually masked when it appears in the sunlight. It travels incognito. Its outward form is usually honest and virtuous. It is always plausible, and many times deceptive. Because this is so, it is the duty of courts to use the judicial searchlight with great care and prudence. The identity of this legal bogey is frequently revealed by its environment. Facts and circumstances small and inconsiderable in themselves often lead to unerring conclusions.”

Cited in *Zimmerman vs. Bannon*, 77 N. W. P. 736 (Wis.).

## XI

The failure of defendants to testify to lack of notice or knowledge prior to the performance of their contract to complete the pumping plant, and prior to their release from their contract to install the second unit, warrants a presumption of notice.

13 Ency. of Ed. 905.

Farley vs. Bateman, 22 S. E. 72.

“Another rule of law, equally elementary, which is frequently applied in such cases, is that when a fact is peculiarly within the knowledge of a party, he must furnish the necessary evidence of such fact.”

Cited in Rothchild vs. Weber, 15 Oregon, p. 391.

## XII

The Iowa reports cited in the memorandum on the merits to sustain the Court's position are not at hand, but we have them in the N. W. Reporter and cite them from these reports.

“The distinguishing feature between the cases cited under paragraph 111 of this brief and those cited by the court is: That in all the cases cited by the court there was an intervening equity before the passing of the legal title, just as in the case at bar. while in the cases cited by defendant there was no such intervening equity.”

41 N. W. 210 (2 L. R. A. 529), McCleary vs.



Wakefield, was not a case of fraud, but of failure of consideration.

110 N. W. 930 (119 Am. St. 639), *Hall vs Eary*, the question of fraud was decided against the plaintiff seeking to set aside the deed and the defendant had no knowledge of the original transaction whatever. 124 N. W. 607, *Augustine vs. Schmitz*. In this case it was claimed that a deed was made to the party committing the fraud and afterwards changed.

115 Pac. 1081, *Clemmons vs. McGeer*, was decided on the pleadings. The fraud was sought to be set up in the reply in a suit to quiet title and was held to be a departure and the reply failed to connect the defendant in any way with the fraud.

The real question involved in all these cases was the validity of a deed delivered with the grantee's name left blank and afterwards filled out. None of the defendants in these cases were in any sense a party to the original deal.

## POINTS ON MATTER OF FACT

### I

The false representations were clearly proved to have been made beyond doubt. These representations were:

A. The bonds were secured by 125 per cent of good, valid and solvent securities.

B. That the bonds were further secured by 125 per cent of sales contracts.

C. That the company had sufficient assets to back up the guarantee on the bonds of the Washington Orchard Irrigation and Fruit Company, (See clause in bond itself as set forth, page 14, Bill of Complaint, and the following portions of the testimony:

Testimony of William L. Tobey, Record, pages 92 to 96 and 99 to 100, and 115 to 116.

F. L. Tobey, Record, pp. 336 to 338.

Statements of same character made to others.

Testimony of M. Isabelle Forbes, p. 298, Record.

Testimony of F. C. Koppen, p. 270, Record.

Exhibit 25, p. 565, Trust Agreement.

Exhibit 23, p. 563, letter to F. C. Koppen.

Exhibit 71, p. 600, letter to Belle Nickell.

Exhibit 77, p. 603, letter to Leonard Agency.

Exhibit 83, p. 607, letter to Mrs. F. D. Cooney.

Exhibit 87, p. 610, letter to W. A. Burleigh.

Exhibit 89, p. 610, letter to C. H. Graves.

Exhibit 93, p. 613, letter to S. C. Douglas.

Exhibit 149, p. 649, letter to Leet.

## II

That they were false is just as clearly proven:

A. The securities held by the Trust Company were water mortgages on Desert Land Claims.

B. These water mortgages did not amount to the required sum.

The total amount of these water mortgages held altogether during the time that the Trust Company was doing business amounted to \$372,000. (Exhibit 37, p. 571). The amount of these securities on March 6th, 1911, was \$92,000. See Exhibit 38, page 572, letter from George C. Hodges, the trust officer, to DeLarm and Biehl, giving a list of the securities, being James Perry, \$8,000; Mary Domay, \$20,000; Jennie Koppen, Elizabeth Montgomery, W. E. Stickles, W. B. Weber, \$16,000.; and of this the Mary Domay mortgage was accompanied by a \$16,000 note not signed, and the mortgage had been changed to include 160 acres not put in the mortgage originally, and without any authority. (Testimony of F. C. Koppen, p. 221.)

The original list of mortgages transferred to the Trust Company at Portland were the following, and were dated March 16, 1911; Laura Wattle and husband, F. C. Koppen and wife, Emil F. Cordes, Virgil H. Robinson and Alfred Gagner and wife, amount \$16,000 each, or \$80,000.

The Tobey deeds were made on the 15th day of March, 1911, before this assignment was made. (Exhibit B to the Bill of Complaint, page 29.) At the time the Tobey's were negotiating for these bonds, late in February and early in March, they were told that there was \$300,000 or \$325,000 of bonds then is-

sued. (Test. W. L. Tobey, page 105-106, F. L. Tobey, page 342.)

That the DeLarm people were minimizing the amount outstanding is clearly shown by the various statements made by them. Exhibit 63, a statement under oath, dated March 11, 1911, before these bonds were delivered, shows an outstanding liability of bonds in the sum of \$400,000. (Page 593.) In Exhibit 62, page 591, it is stated that there was \$104,000 in bonds issued, and in Exhibit 59 DeLarm says there were upwards of \$500,000 worth of bonds issued under date of February, 1911. These parties never kept any list of the bonds they issued, testimony of Miss Day, page 262, so it was impossible to ascertain with any degree of certainty the amount of bonds outstanding at the time of the Tobey deal. As the sworn statement made to the Casualty Company was for the purpose of obtaining credit, a statement made therein might be taken as approximately correct, which is that there was \$400,000 of the bonds outstanding, which was on March 11, 1911. From the testimony herein it is probable that the officers of the Company never knew how many bonds they had out.

The total sales contracts that they had outstanding at the final close was \$239,465.00 worth. These contracts were on lands in Sections 16 and 20, within the Wahluke Project, and upon which they had nothing but a contract for the purchase thereof. (Test. of F. C. Koppen, page 218 and 219), and of

these they kept no record in the main office. (Test. Isabelle Forbes, page 298.)

To fill up the discrepancies in these securities on March 15th, 1911, the Washington Orchard Irrigation and Fruit Company made and delivered to the Oregon and Washington Trust Company, a mortgage for \$1,000,000.00, covering the pumping plant, franchises, machinery, and so forth. This mortgage was afterwards declared void by the U. S. District Court at Seattle. (Exhibit 57, page 581), and it will be shown hereafter that at the time the land, upon which the pumping plant was situated and the right of way for the ditches, was the property of the Northern Pacific Railway Company, and that no agreement had been made with them for the purchase thereof, except the tentative agreement which hadn't been carried into effect, and was never carried into effect so far as the Washington Orchard Irrigation and Fruit Company was concerned. To show the carrying out of their fraudulent operations, Exhibit 36 was introduced in evidence, dated September 30th, 1911, being a mortgage covering a note for \$7,500,000 given by Washington Orchard Irrigation and Fruit Company to Columbia River Orchard Company, and endorsed over to Oregon and Washington Trust Company, covering practically the same property as in Exhibit 35. (Exhibit 36, page 569.)

C. Some of these mortgages were about to expire, and some of them had already expired. Exhibits 32,



33, and 34, page 568, expired in May, 1911; Exhibit 9, page 552, expired April 1, 1911; Exhibit 10, page 552, expired May 16, 1911.

It needs no argument to show that these mortgages were practically worthless. They were mostly taken on Desert Land filings, and the title thereto was in the Government of the United States, and the validity thereof depended upon the title being transferred from the Government to the individual, and that depended on putting water on the land and the value thereof thereafter depended upon the cultivation of the land, making the whole thing a speculative and promotion scheme pure and simple. The contracts were all based on Sections 16 and 20, to which the DeLarm people had no title other than a mere equitable interest under their contracts, and the value of the lands depended entirely upon future contingencies.

The method of trading the bonds for property as detailed by DeLarm, page 586, in Exhibit 58, which shows the general scheme of disposing of the bonds, was a proposition calculated to dispose of the bonds at much less than their par value, and the immense number of these bonds that were put out showed the intention from the first of the DeLarm people to defraud everybody they could. Testimony of Louis B. Sichler, page 285, at the bottom of the page, shows that there was a total, during the year 1911, of some four and a half million par value of the bonds

put out, and the testimony of M. Isabelle Forbes, page 297, 809, shows the recklessness of the DeLarm people in disposing of the bonds and that they themselves treated them as worthless, and disposed of them to get whatever they could out of them to defraud the public.

The DeLarm people never had any real substantial backing, as shown by Exhibit 58, page 282, being a resume of the whole scheme by DeLarm himself, showing his efforts to put out bonds in the name of one corporation, taking the property in the name of another to get it out from under the bonds, and to save even what little they had put into the Wahluke project.

The whole thing was a gigantic scheme to defraud.

The evidence shows that they did not hesitate to use forgery in obtaining these securities.

They forged Jennie Koppen's name to a note and changed her duplicate mortgage to cover her homestead. Testimony Jennie C. Koppen, pp. 331-2.

They changed the 40 acre mortgage of Mary A. Domay, to a 200 acre mortgage. F. C. Koppen, Testimony, pp. 220-1.

The affidavit of W. E. DeLarm to these mortgages, declaring them to be valid and solvent securities (Exhibit 25, p. 565) was in itself a fraud. (Form of affidavit, Ex. 12, p. 555.)

The statement of resources, 4,000 acres owned and 10,000 acres under option, was a bald fiction. W. I.

Tobey, p. 94. See also M. Isabelle Forbes, p. 298.

Testimony of F. C. Koppen, as to what they actually owned. P. 218-219.

Testimony of G. H. Plummer, p. 163, as to Northern Pacific lands.

Charles A. Kilbourne testified, p. 532, "I found out subsequently the whole affair was crooked."

The lower court found that the fraud was proven. Memorandum on Merits, p. 72.

### III

That the Tobeyes relied upon the false statements made to them, transferred their property in reliance thereon, and were thereby cheated and defrauded of their property, is clearly shown.

Testimony of W.L. Tobey, pp. 101 and 102, and 115 to 126.

Testimony of W. L. Tobey, pp. 340 and 343-4.

W. L. Tobey attempted to make an investigation of the bonds at Seattle, but was steered up against A. C. Gunn, who was connected with the company, (Testimony of Isabelle Forbes, p. 306), and Morrison, who was one they usually referred prospective traders to. Exhibit 149, p. 649. Inquiries made from other than these two were unavailing. Testimony of W. L. Tobey, pp. 99 and 100.

## IV

The purchase by the Kilbournes was the equity in the land which DeLarm held under his contract. Exhibit A to the Bill, pp. 24-27. As DeLarm never received the legal title, the only title he ever had was this equity.

E. C. Kilbourne testified, p. 380: "The result was that he agreed to have it deeded to me as security, etc.," and on page 386, "As I said before, on the 8th of March when we agreed to accept the ranch in payment and go ahead and complete the plant, we didn't agree upon any terms for which we would allow for the ranch, but on the 24th of March we came to an agreement with Mr. DeLarm regarding what we would do. It wasn't reduced to writing." (Then follows statement of agreement.)

The lower court found, p. 71, Memorandum on Merits:

"Before the deed had been executed and delivered to DeLarm, he sold the property to the defendants Kilbourne, in consideration that, as individuals, they would assume and pay an indebtedness of about \$43,000 due the Kilbourne & Clark Company on an unfinished contract for the construction of a pumping plant for the Orchards Company and would complete such contract and install an additional unit." As DeLarm had nothing to sell but his equity, he could sell nothing but the equity and the Kilbournes could buy nothing but the equity from him.

The lower Court, however, found, p. 74, Merits:

“But the Kilbournes did not purchase DeLarm’s interest in the contract with the plaintiffs, or succeed to his rights thereunder, nor in their defense based on such contract. They purchased the legal estate and it has been conveyed to them, and the fact that the deeds were made to them direct by the plaintiffs, and not to DeLarm and by him to them, does not, in my judgment, deprive them of the right of a bona fide purchaser.”

The legal title to this property was bought and paid for with bonds, and the Kilbournes did not purchase the legal title with bonds unless they were parties with DeLarm in the whole deal.

No consideration whatever passed between the Tobeyes and the Kilbournes for the deeds. In the answer, p. 62, Record, the Kilbournes say: that at the time DeLarm held the equitable title and this equitable title furnished the consideration. DeLarm surrendered this equitable title, not to the Tobeyes, but to the Kilbournes, and it was this equity the Kilbournes traded for, and this was done before they obtained the legal title from the Tobeyes. It follows, then, that no consideration passed to the Tobeyes from the Kilbournes for the legal title.

## V

The Kilbournes were not innocent purchasers, for value without notice.



The Kilbournes were stockholders in the Kilbourne Clark Co., and officers and agents of the company. Testimony E. C. Kilbourne, p. 365; C. A. Kilbourne, p. 487.

At the time they entered into the contract to build the pumping plant, they inquired as to resources and found them to be as follows: Testimony of E. C. Kilbourne, p. 367. "At that meeting Mr. DeLarm went over verbally his resources, which he had at that time consisted of desert land water mortgages, chiefly; a tract of land, 40 acres, known as the town-site of Wahluke; and 320 acre piece of school land, which they had under contract to purchase from the state."

They then entered into the contract, Exhibit F, p. 663, on Jan. 18, 1910, and proceeded with the work of construction of the pumping plant until the bills, including engineers' profits, amounted to \$45,355.72. Exhibit 135, p. 638. During all this time they received no pay on the work; but had taken a lot of these water mortgages as security and DeLarm had caused to be deeded and transferred to E. C. Kilbourne some lots and mortgages, some of the lots were sold and some mortgages paid which were credited on the account. These deeds and mortgages were as follows:

Hawkins mortgage, \$1,334. and Sam Archer mortgage, \$825; testimony of E. C. Kilbourne, pp. 414-415, both credited July 15, Exhibit 135, at p. 641.

Reinmouth property and Billings property, valued

at \$15,000.00, p. 411, E. C. Kilbourne, 406, Ex. 138, p. 642.

Green Lake Add. lot, p. 418, Exhibit 136, netting \$874.42.

Anderson mortgage, \$800.00. Exhibit K, Test. p. 420.

Burke's Second Addition lot, pp. 425 and 430, E. C. Kilbourne, \$1,000, kept by Kilbournes.

Palisades Addition lot, Exhibit 144, page 645, E. C. Kilbourne, p. 425, turned back.

The whole stock and trade of DeLarm and Biehl was the Columbia River Orchard bonds. (Ex. 59, p. 582, at pp. 585 and 586. Exhibits 69, p. 599; 79, p. 605; 85, p. 608; 86, p. 608; 90, pp. 610-12; 92, p. 612; 95, p. 613; 96, p. 614; 98, p. 615; 100, p. 615; 101, p. 616; 104, p. 616; 105, p. 617; 106, p. 618; 107, p. 620; 114, p. 626; 118, p. 628; 119, p. 628; 120, p. 629; 122, p. 630; 125, p. 633; 126, p. 634.) The evidence of that fact is voluminous.

The Kilbournes knew that these bonds were being traded wherever possible for property. They knew that bonds were traded for the Tobey property, and they recommended Glover to take his 840 acres for bonds. Exhibit 145, p. 645, and also Nott Ex. 142, p. 644. There is nothing in their evidence to show that they didn't know that the bonds were being traded wherever trades were possible. On the contrary, C. A. Kilbourne testified, pp. 532-3:

Q. Didn't you know then, Mr. Kilbourne, up to

the time that the thing collapsed, that is, during the pendency of it, the latter part of it, that they were unable to negotiate their bonds for money, either there in Seattle, or anywhere else?

A. No, I didn't know they were not able to. I knew they hadn't sold any so far for cash; that is, that I knew of. They may have sold some, but I mean to say, it hadn't been reported to me, and they still owed us money.

Q. Anyhow, you knew this thing: In order to get money, they would have to do it through the bonds—what they told you before?

A. Yes, sir.

Q. You depended on that. You depended on their statement about that, knowing from their statement that was the only method they had, as far as you knew, of getting money?

A. I expected them to realize from the sale of their bonds, and pay us.

Q. Did you know of any other way they had to get money?

A. No, I didn't know of any other way.

Q. You relied upon their sale of bonds to get money to pay you?

A. I certainly figured that is the way they would get it.

Q. Now, up to the time the Tobey deal was made, you knew then that they couldn't get money through the bonds? That is, they hadn't got money?

A. I will have to say I didn't know that. I understood they had made some sales or trades in some way, so they had disposed of some of their bonds, how many I don't know. I have never been told.

E. C. Kilbourne testified, p. 437:

"I wondered how he could get \$140,000 then because I had known of some of this—of his having bought properties for bonds, he told us about."

From July 15, 1910, down to the Tobey deal in March, 1911, the Kilbournes had received but very little on their claim. In cash they had received \$800.00 from the Anderson mortgage, and \$874.42 from the Green Lake Addition lot. They had as security the Tacoma properties—Billings and Reinmouth—valued at \$15,000.00, and the Burke's Addition lot, valued at \$1,000.00, and a lot of their water mortgages.

In this state of the account the Tobey deal was made, as detailed by W. L. Tobey, pp. 92 to 106, and by F. L. Tobey, pp. 336 to 341, and between DeLarm and the Kilbournes as detailed by E. C. Kilbourne, pp. 379 to 388 and 400-1, and by C. A. Kilbourne, 493 to 496. The land was taken over for a consideration of about \$69,000.00, according to statement of the Kilbournes, but we will show by analysis of the figures hereafter, that it was much less than that sum.

The Kilbournes testified that they thought there was but \$300,000.00 of bonds to be issued, and that

the project was good for that amount of bonds. E. C. Kilbourne, pp. 404 and 437-8.

It must have been upon this testimony that the lower Court found the Kilbournes to be innocent purchasers. E. C. Kilbourne, pp. 436-7.

Q. Now, at this time, May 27th., or the end of May, at the time you wrote this letter, did you believe those bonds good?

A. Yes.

Q. Why did you think they were good?

A. Because we had practically completed the pumping plant then, Fox was about through with the ditch, well along with it, and it looked as though things were going to be all right.

Q. You thought water would be in the ditch?

A. Yes, sir; we had then the machinery all in.

COURT: Did you know how many bonds had been issued?

A. I supposed \$300,000.00.

COURT: That is what you thought when you wrote this letter?

A. Yes, sir.

In the introduction of the Glover letter of May 27, 1911, Exhibit 145, p. 645, the Court made the following remark, at page 427:

“COURT: That is written two months after the trade; after he admits he knew that bonds had been traded. Put that in the record if you want to. The



only thing the Court can draw from that is that at the time he thought the bonds were good.”

The question arises at this point: Was the Court warranted in the conclusion that the Kilbournes thought that the bond issue was limited to \$300,000.00, and that the project was good for that amount of bonds?

We call the Court's attention to the following facts which we think warrant a different conclusion:

1. At the time of the Tobey deal E. C. Kilbourne, at page 437, knew that bonds had been traded to such an extent that he wondered how DeLarm got the \$140,000.00 to trade to the Tobey's. Then he claims, and this is one of their main contentions, that the Tobey ranch was worth not more than \$52,000.00, p. 49, and the personal property not more than \$9,500.00, p. 50. Answer making, making a total valuation of \$61,500.00 placed upon it in their answer. Edward C. Kilbourne had been over the ranch and examined it.

According to Mr. Kilbourne's story then, he thought that DeLarm was extravagant with the bonds, and the Kilbournes knew that if the bonds were ever paid, they would have to be paid out of the project. They must have thought that DeLarm, if the bonds were GOOD, was getting only 50 per cent of the value of his bonds in the deal, and that he was burdening the project with bonds to the extent of 100 per cent greater than their proceeds.

Then again, when he wrote the letter to Glover, Exhibit 145, p. 645, he must have known that DeLarm had bonds to trade, although he "wondered" at the amount of the Tobey bonds. When he enclosed the Nott letter, Exhibit 142, p. 644, in the letter to Hodges, Exhibit 140, p. 643, he must have known that DeLarm still had bonds to trade.

This copy of the Nott letter bears internal evidence that it is the copy enclosed in the letter, Exhibit 140, p. 643; C. A. Kilbourne's testimony, pp. 511-512, and Mr. C. A. Kilbourne practically admits the letter, although he refused to acknowledge that it was the copy.

In the Glover letter, Exhibit 145, E. C. Kilbourne says in addition to advising Glover to trade his land for bonds, p. 646 : "They have made some extensive purchases of lands in Oregon, and I understand they just completed a deal for several thousand acres of timber land." This letter is dated May 27, 1911, and yet on or about March 15, 1911, E. C. Kilbourne wondered where DeLarm got all the bonds necessary to trade for the Tobey ranch.

In the letter of May 23, 1911, E. C. Kilbourne, in his letter to C. M. Glover, Exhibit N, p. 673, used this language: "We are not in shape to buy the land at present, but the parties from whom we bought the Tobey ranch are anxious to get another farm on similar terms, therefore, if you will write giving me

a complete description and inventory, as near as possible, we will put it up to the party.”

The Glover land was traded for bonds (E. C. Kilbourne, p. 446), and traded to the Kilbournes for a lot of stuff wanted by DeLarm, and the attention of the Court is called to the language used by E. C. Kilbourne in testifying about this, as follows: Mr. DeLarm came in about a month after this, a month or two (referring to Glover letter), and said—asked—says—“I would like to sell you 840 acres of land.” I says, “We are not buying land.” He says, “Well, it joins your ranch.” I said, “Where?” He said, “It is the Glover land.” I said, “You got that?” He said, “Yes.” I said, “How did you get that, and when?” And he explained that they bought it with their bonds, and then wanted to sell it to us.

From these circumstances, we think the conclusion naturally follows, that the Kilbournes knew that the bond issue was an unlimited one, notwithstanding their oral testimony in court that they thought the issue was limited to \$300,000.00. If they knew it at the time of these letters, when did they learn it? It was up to them to explain, and they failed to do so. Their testimony that they thought the bond issue limited apparently covered the whole of the time from the first issue down to the final crash in February, 1912, and undoubtedly this is the impression they desired to give the Court in their oral testimony, and the Court found that they still thought the bonds

good down to the time the \$10,000.00 was paid to DeLarm out of the Wakefield mortgage in September, 1911. On page 72, in the Memorandum on the Merits, the Court says: "But the evidence shows that the defendants Kilbourne were not parties to such fraud, and knew nothing about it until long after they had paid the full consideration agreed by them to be paid for the property." Again, on page 73, the Court says: "paid DeLarm ten thousand dollars, which was a reasonable sum, to be released from the stipulation to construct the additional unit, before they had any notice or knowledge of the fraud."

We think that the conclusion of the Court was erroneous, page 427, that the Glover letter, Exhibit 145, p. 647, was evidence to him that E. C. Kilbourne thought the bonds were good; and we think that from the foregoing facts and other facts hereafter to be discussed, that the Glover letter is evidence that the Kilbournes were standing in with DeLarm, assisting him to trade his bonds for property, and that they were actively engaged in reaping the chief benefit therefrom.

Again, the Kilbournes knew that the irrigation projects were all at this time in a bad way financially, and that that kind of securities were a drug on the market. The Kilbourne Clark Co. went out of business December 31, 1910. Ex. K, p. 429.) and C. A. Kilbourne testified at page 492:

Q. Why did the Kilbourne & Clark Company go out of business?

A. Well, for the last two or three years they had been engaged principally in constructing irrigation and pumping plants, not the ditch plant, merely the machinery part of it, and the market for irrigation securities was apparently so bad, had become so bad, that most of the companies for whom we were doing work were in financial straits. They couldn't sell their securities, and they couldn't pay us, and we could no longer continue in business, and I was not able to put up any more money, and didn't feel inclined to do so anyhow, so when this Columbia River Orchard job got in bad shape, we decided the best thing to do was to go out of business entirely, and merely to finish up the work we had on hand.

2. At the time the Kilbourne Clark Co. took the contract for the pumping plant, DeLarm gave the Kilbournes a statement of the resources behind the project, which consisted of 40 acres of land, some desert land water mortgages, and a contract for 320 acres of school land. (E. C. Kilbourne, p. 367.)

During the summer of 1910, and while the pumping plant was being built, E. C. Kilbourne interested himself in trying to get the Northern Pacific Railway Co. to sell the right of way for the ditches and the lot upon which the pumping plant was being built, to the Columbia River Orchard Co. (Testimony of G. H. Plummer, pp. 164-5-7; E. C. Kilbourne,



pp. 394-5-6-7-8), and the Kilbournes knew that the right of way for the ditches and the site for the pump house was still in the Railway Co., at the time of the Tobey deal. In fact, the title to these lands never passed to either the Columbia River Orchard Co., or to the Washington Orchard Irrigation and Fruit Co., but was deeded to the Columbia River Water Co., a corporation that had nothing to do with the bonds.

On February 7, 1911, Mr. Wells, of the Pacific Power & Light Co., in response to a telephone inquiry from C. A. Kilbourne, wrote a letter to Mr. Kilbourne (Ex. 146, p. 646), calling his attention to the definite facts, it would be necessary to furnish the Power Co., in order to obtain the contract for power from that company. In response to this, DeLarn sent to Kilbourne Clark Co., the statement, Ex. 147, p. 647, on February 10, 1911. This statement was a long ways from being the definite information required by Mr. Wells in the letter of February 7. Mr. E. C. Kilbourne, when asked about these letters, turned them off thus:

Q. You remember receiving such a letter?

A. No, I don't, but I presume I did. That is a matter that I don't retain in my mind, because it wasn't part of my business. I retain those things that I have to do and do, better than mere statements of things like that. What I observe or have done, accomplished, why, I remember pretty accurately. Those things that I haven't to do with, like

that, I don't." The inability of DeLarm to show definite resources evidently was no concern of Mr. Kilbourne.

At the time of the Tobey deal DeLarm had failed utterly to comply with Mr Wells' request, and never did comply with it, and this fact was undoubtedly known to the Kilbournes at all times. They knew, too, that DeLarm included in that Exhibit 147 all the lands covered by the second ditch and that DeLarm had not even commenced to take any steps looking to its construction.

We desire to show, from the foregoing fact, that the Kilbournes had knowledge of the resources of the DeLarm people; that they had knowledge that DeLarm, through them, was called upon for definite information and couldn't and didn't furnish it. Then Mr. E. C. Kilbourne, at page 454, says: "They offered 200 acres of land, I think it was down in Jefferson County, which they had purchased from Mr. Morrison with their bonds," etc., and on page 455: "We furnished abstracts to Kerr & McCord, who were the attorneys of the Pacific Power & Light Company in Seattle, on some land down in Jefferson or Clallam County." And again, "I don't think they were satisfied with the value of the land at that time."

Q. You said they were ready to go ahead?

A. Oh, they have been at all times.

Q. Under what condition?

A. That enough security be put up to guarantee their bill for a year or two.

The Kilbournes then knew during all this time that DeLarm was unable to furnish the security asked for, at the time of the Tobey deal. See testimony H. P. Nolan, p. 483.

3. The method of dealing with the DeLarm people by the Kilbournes furnishes an insight into their motives in all these transactions.

The Kilbournes entered into the contract of January, 1910, Exhibit F, pp. 663-4, upon the basis of cost for all work, tools and material, with a profit of ten per cent added.

They then let a sub-contract to Puget Sound Bridge & Dredging Co., on the same basis, with a twelve and one-half per cent profit added to the Dredging Co., Exhibit H, pp. 666-7. The profit of ten per cent to the Kilbourne Clark Co. was added to this. Then when payments hadn't been made they get an amendment to the contract and make the per cent of the profit twenty-five per cent. Exhibit G, pp. 664-5-6, and at the same time raise the limit of cost and provide in Paragraph 3 a stringent provision for forfeiture on account of failure to make payments.

The twelve and one-half per cent profit on the Puget Sound Bridge & Dredging Co. account made the price to the Kilbournes  $112\frac{1}{2}$  per cent of cost, and adding their 25 per cent to this makes 140.625 per

cent of the cost of that part done by the Dredging Co., and of this the Kilbournes get 28.125 per cent as their profit.

The deal for the Tobey land by the Kilbournes with DeLarm will be noticed later on, and shows a continuance of the policy of the Kilbournes to get everything possible for themselves and to enhance their profits.

The deal for the Glover lands, heretofore set out also shows a continuance of the same, and others will be noticed further on.

4. The deal between DeLarm and the Kilbournes for the Tobey ranch.

The Kilbournes had two theories in their testimony of the purchase price of the Tobey ranch. One was that C. A. Kilbourne had furnished to the Kilbourne Clark Co., about \$73,000.00, and that he cancelled this indebtedness in consideration of the ranch being deeded direct. (C. A. Kilbourne, pp. 492 and 495; E. C. Kilbourne, p. 389), and the other was that they assumed the indebtedness of DeLarm's corporation to the Kilbourne Clark Co.

Then they had two theories as to the manner in which the title first went to E. C. Kilbourne. One was that it was deeded as security for DeLarm's debt, and the other was that it was deeded outright in payment. E. C. Kilbourne, pp. 379, 380, 386; C. A. Kilbourne, pp. 494-5.

There is also a discrepancy between E. C. Kil-

bourne and C. A. Kilbourne, as to who purchased the ranch.

On page 408, E. C. Kilbourne states: "That was E. C. Kilbourne and C. A. Kilbourne, the agreement on the 24th of March, and we agreed to pay off the Kilbourne & Clark claim of \$43,000.00."

On page 494, C. A. Kilbourne says: "And at that time we made a definite arrangement that the Kilbourne & Clark Company should take over the land in payment of this account, providing DeLarm would do certain other things which he agreed to do." Then he follows with the full statement of the agreement, and then adds: "For the advances which I had made personally, I would take the land for my claim, and would credit the Kilbourne & Clark Co. on the account whatever they had put into it, whatever it had cost them plus their profits, so the Kilbourne & Clark Company would receive the entire benefit to that point." On page 496 he adds: "I will say this also; that it was agreed in my finally taking over the land, that Kilbourne was to have a certain interest in it, in proportion to the amount of money which he himself had coming." Then his counsel tried to straighten this out to square with E. C. Kilbourne's testimony, but failed to make it so.

Which one of the two defendants is correct we do not undertake to say, but in either event it is pertinent to inquire what E. C. Kilbourne paid for his interest in this land, and we shall undertake to show



that so far as the case discloses, it isn't shown that he paid anything.

The deal as detailed by both of these parties, that the consideration going to the DeLarm people, as the account owed to the Kilbourne & Clark Company, less a little over \$10,000.00 agreed to be paid by DeLarm, \$7,500.00 to the Puget Sound Bridge & Dredging Co., and the Moran account, which according to Exhibit 135, pp. 638-9-640, amounted to \$2,571.99; the completion of the pumping plant at a cost of \$17,000.00, and the construction of a second unit estimated at \$10,000.00. The account then due, less payments received by sales of property and payment of mortgages, transferred by DeLarm to E. C. Kilbourne, was \$41,522.30, reducing this sum by the value of the lot in Burke's Second Addition (pp. 540 and 431), leaves a balance of \$40,522.30. Reducing it further by the amount DeLarm agreed to pay and for which he put up as security the Tacoma properties, valued at \$15,000.00, amounting to \$10,071.99, leaves \$30,450.31 as the amount of this claim to be applied on the purchase price of the Tobey ranch. Of this amount the Kilbournes figured in \$9,071.14 profit on the contract under their 25 per cent clause. Of the sums then owed the Kilbourne & Clark Company, in arriving at what was paid DeLarm, only \$30,450.71 could possibly be figured into the purchase price of the Tobey lands.

Then of the sum they claim as the cost of finishing

the pumping plant, they have inserted \$1,000.00 interest and attorney's fees they paid the Puget Sound Bridge and Dredging Co. (See item under date of July 27, Ex. T, at page 681.) This item doesn't belong in this account.

They have also added \$1,603.88 for profit at ten per cent on cost, although E. C. Kilbourne testified, p. 430, that no profit was included. This item then should be reduced by this \$2,603.88.

In this connection it is pertinent to notice the apparent frankness of the Kilbournes in producing their books for our inspection, pp. 500-1-2. When, however, more definite information was sought than that contained in Exhibit T, p. 677, as to the various items of expense contained therein, it was found that the original books of entry, the journal, etc., were missing, and that the ledger gave no further information, p. 537. When it was noticed that sums of \$1,250.00, \$1,000.00, \$1,069.80 are shown only as deposits in the bank and \$500.00 expenses, etc., the significance of this inquiry is apparent and the frankness of these parties in offering their books for inspection is only apparent and not real.

Again an item of salary and expense of Managing Engineer, \$1,000.00, appears at p. 683, in the \$17,000 account which appears to have been paid May 22, 1912.

However, reducing the item of \$17,642.77 as it appears in the statement by the \$1,000.00 attorney fee

and \$1,603.88 profits, and we have the sum of \$15,038.89, as the cost as near as we can get at it from the statement.

In this connection it is pertinent to notice, Exhibit 137, p. 642, which is a letter from E. C. Kilbourne to DeLarm, estimating the cost of completing the plant at \$5,500.00. This letter was written Nov. 8, 1910.

A comparison of E. C. Kilbourne's oral testimony, pp. 427-8, with the items in Exhibit T, p. 677, shows rather wild statements on the part of Mr. Kilbourne, as to the cost of some items in the cost of completion of the plant.

Adding the \$30,450.31, balance of Kilbourne & Clark account \$15,038.80 shown as cost of completing plant as far as they went with it and the \$10,000.00 paid to DeLarm to release them from the second unit and we have \$55,489.20 as the cost of the Tobey ranch. Of this sum the part they are to pay to the Puget Sound Bridge and Dredging Co. has not been paid, and the Dredging Co. have foreclosed the lien on the pumping plant. If this company should sell the pumping plant for enough to pay their lien, the Kilbournes may never have it to pay, and in that event would never have to pay the \$7,500.00 for which they hold the Tacoma properties as security.

Not much wonder they desired to show the property was worth no more than \$52,000.00, and the personal property no more than \$9,500.00.

5. *Value of Property.* The witness J. L. Blalock.

p. 314; R. T. Cox, p. 318; L. O. Ralston, p. 322; J. A. Ward, p. 324; E. O. Tobey, p. 326; Jay Bowerman, p. 361; Walter S. Wade, p. 468; are all on the question of valuation.

Walter S. Wade, p. 469, places the value of the land at \$15.00 in cash per acre. This witness was called by defendants.

J. L. Blalock, p. 315, places the value of the land at from \$20.00 to \$25.00 per acre; L. O. Ralston, p. 322, at \$20.00 to \$25.00 per acre; J. A. Ward, p. 324, wouldn't put the value at less than \$20.00; E. O. Tobey, p. 327, places it at \$27.00 per acre, including the equipment.

The equipment was worth \$17,500.00 to \$18,000.00, as testified to by W. L. Tobey, p. 107, although it was alleged in the complaint to be worth \$14,000.00 to \$15,000.00. He explains this discrepancy on the same page and the defendants did not testify particularly as to the equipment. However, taking the minimum alleged at \$14,000.00 for the equipment, and the minimum price of land as testified by Wade at \$15.00 per acre, and we have a total minimum valuation of \$79,250.00 and a maximum valuation of \$117,450.00 for ranch and equipment as testified by E. O. Tobey, and a maximum of \$120,000.00 as testified by the plaintiffs. From the weight of the testimony it would appear that the value was over \$100,000.00.

E. C. Kilbourne testified at p. 379 to the following conversation:

A. On the sixth of March, Mr. DeLarm came into the office and asked if I would consider taking the Tobey ranch, which I had examined, and going ahead—in payment for our bill, and going ahead with the plant, and finishing it, complete it. The result of the negotiations, which lasted over two or three days, were briefly as follows: He said the ranch was worth \$120,000.00, that that is what they contracted to pay for it. This is the first time that I knew what he had contracted to pay for it; that is, we would finish the plant, he was willing to allow us a big profit. He says, 'I am willing to allow you \$20,000.00 or \$25,000.00. You take the ranch for \$75,000.00—'—or we discussed the value of it then—the real value. He said it cost \$120,000.00 and that is what it is worth. Well, I said, 'I don't consider it any such value.' Well, he reduced it finally to \$100,000.00 and proposed that we take the plant and call it \$75,000.00, for our services, plant, etc., and he retain one-fourth interest in the ranch."

Again, p. 437: "When I protested about his paying such a price for the farm, it wasn't worth it, and he explained, why, as I said, I asked him—I says, 'Where did you get your bonds? How did you get so many?' "

If the date of this conversation is correct, it was two days after the contract of March 4, 1911, Exhibit A to the Bill, p. 24. The \$120,000.00 consideration would indicate that it was after the first contract was



signed. He knew the value that the Tobeyes placed on the ranch and he knew the value DeLarm placed on it, and that DeLarm was willing to sacrifice big to get some kind of a deal with him. He then knew that DeLarm was reckless in his dealing in the bonds, and was willing to encumber the Wahluke project with large issues of bonds to accomplish results at less than fifty per cent of the proceeds finally derived from their disposition.

6. E. C. Kilbourne, as just shown, testified that DeLarm proposed that he retain a one-fourth interest in the land. There is some slight evidence in this case that he did so. In Exhibit 148, at page 648, C. A. Kilbourne uses this language: "However, on account of a desire to settle up our partnership matter, we will consider any reasonable proposition made to us at this time." This letter was written to DeLarm in response to a telephone communication July 7, 1911, and encloses to DeLarm an inventory of the ranch. Then two months later the Kilbournes give Wakefield a mortgage to pay DeLarm \$10,000 and the Dredging Co. \$7,500. They offer the explanation that this is to release them from the construction of the second unit; but they cannot and did not explain why they were paying DeLarm \$10,000 and the Dredging Co. \$7,500 when this \$7,500 was a debt DeLarm was to pay. Under the difficulties of making collections from DeLarm the reasonable thing to have done would have been to have ap-

plied \$7,500 of this \$10,000 to the payment of the Dredging Co. No receipt or written release is shown to have been given by DeLarm to the Kilbournes to release them from building the second unit. Neither of the Kilbournes would explain the reason they paid DeLarm the \$10,000 instead of giving him \$2,500 and the Dredging Co. the \$7,500, other than it was to release them from building the second unit. E. C. Kilbourne, p. 412; C. A. Kilbourne, pp. 531 and 533-4.

If DeLarm still held an interest in the ranch after the Tobey deal, this would offer the solution why the Kilbournes were willing to furnish the \$7,500 to the Dredging Co. and still pay DeLarm the \$10,000.

7. There are some circumstances in this case taken in connection with the whole case that tend to show that the Kilbournes were parties with DeLarm or had knowledge of the fraudulent acts and that shows that the Kilbournes were interested with DeLarm in the transactions.

a. E. C. Kilbourne visited the Tobey ranch with DeLarm, and the circumstances might show either lack of knowledge or a desire to assist DeLarm (E. C. Kilbourne, pp. 371 to 378; W. L. Tobey, pp. 96-98). It will be remembered that DeLarm agreed to pay all expenses, p. 372. Mr. Kilbourne said: "I will go down and take a look at it, if you will pay all the expenses, which he readily agreed to do."

This trip, according to Mr. Kilbourne, was wholly an accommodation affair, and just why he found it

necessary to ask DeLarm to pay all expenses doesn't appear. In fact, unless he knew that profit was to come to him out of the trip, it would have been proper for him to ask DeLarm to pay him for his time.

Again, on p. 339, F. L. Tobey testified:

"There was some talk among the four of us about the stock. Mr. Kilbourne made a remark that we had a very nice bunch of stock, and I think in the course of the conversation he asked, in the event of a trade, if the purchasing party would be allowed to select the stock to a certain number that had been agreed upon. We told him that we would reserve that privilege ourselves."

The fact that Mr. Kilbourne desired to select the stock may or may not be significant according to the point of view. But with all the other facts in this case it looks significant of the fact that the Kilbournes were interested at that time in the deal.

The talks E. C. Kilbourne had with Biehl, pp. 352 and 335, shows that Mr. Kilbourne was interested in the deal before he went down there.

b. The Kilbournes held a lot of the water mortgages as security for their indebtedness and knew what they were. Exhibits 139, 140, 141, pp. 642-3. Testimony E. C. Kilbourne, pp. 421-5, and knew that they were at least part of the securities behind the bonds, p. 393.

c. The contract for the second unit was never put in writing. E. C. Kilbourne, p. 388, except as con-

tained in Exhibit 58, p. 582. Mr. Kilbourne testified as follows, p. 388

Q. You may state when this agreement in which you were to complete these matters, and take the property in payment, the date?

A. The 24th of March, 1911.

Q. And you say it was never put into writing?

A. Only partly. I turned immediately to our stenographer, and dictated that letter to blank, that is in evidence here. The other people put it in.

And again on page 392, he testified:

Q. (Continuing). And the intake. I show you Plaintiffs' Exhibit 58, and ask you if that is the letter you refer to, which is a settlement between you and the Orchards Company and DeLarm, to which you have just referred?

A. Yes, that covers part of the settlement.

Q. Which part?

A. The part which we were to do. Complete the plant, and that the Kilbourne & Clark Company had been paid. I will state right here that that is not exactly as I dictated it the first time to our stenographer. I addressed it to the Columbia River Orchards Company, but, at Mr. DeLarm's request, I changed it to the Washington Orchard Irrigation and Fruit Company. That is the first time that I knew that company was in existence."

Now, if they were intending to write a letter for advertising purposes to assist DeLarm in trading

off his bonds, this letter would be fully explained by that fact. In it they say: "We are enclosing the contract on our part to install the second unit at such time as you may required the same." The contract could not have been enclosed if it had not been in writing. The date of this letter, too, is March 27, 1911, three days after he said they came to the agreement, and it is written in Portland and directed to the office in Portland. We think that it would be in line with all the facts in this case to construe the writing of this letter as done to assist DeLarm in the further sale of bonds, and DeLarm dictated the company to whom it was addressed, to give effect to the guarantee in the bond with proposed traders.

D. Inconsistencies in the Kilbourne testimony.

1. On page 443, E. C. Kilbourne was asked the question:

Q. Now, Mr. Kilbourne, in reference to the other matter about the bonds, you say that as far as you knew, the bonds were all right. Now, isn't it a fact that up to the time of the Tobey deal, you knew that the DeLarm outfit and all their institutions were broke, and couldn't raise money?

He turned this question off by the answer:

A. They kept Mr. Fox going \$5,000 a month.

Q. Well, you couldn't get your money out of them, could you?

A. Well, the reason was very often because Fox was a better collector and he got it.



The Fox contract was not entered into until Jan. 3, 1911. Exhibit 66, p. 598, and Exhibit 59, at p. 586.

It would take Fox a little while to get started on this contract. He would have to assemble his men, teams and tools, and by the time of the Tobey deal there couldn't have been more than one payment due, yet the witness testified as though the contract had been running for a good while. The fact was he was trying to and did evade the straight answer called for by the question.

In Lewis B. Sichler's testimony we find, p. 283, that Fox had a lien for \$32,000, so that Fox couldn't have been much the better collector.

2. On page 389, Mr. Kilbourne testified:

Q. Now, I wish you would tell the reason why the second unit was not installed and completed as per agreement just spoken of.

A. In the fall of 1911, September, Mr. DeLarn came to me and said that he was very anxious to get some money to pay for the right of way and ditch, and the land there, to the Northern Pacific.

Mr. Plummer testified, p. 166:

"Mr. Wright had paid in June, \$2,700.00 towards the right of way, which was merely a first payment, because they hadn't yet determined what the acreage was, so we couldn't figure up what the consideration would be. That was June of 1911. That money was held until September of the same year, when they gave us the acreage and paid the balance

of the consideration, \$194.00. We then prepared a deed running to the Columbia River Water Company, which was made to that company at the request of Mr. Wright. That deed was sent to St. Paul, for execution and was delivered to Mr. Wright, on November 1, 1911."

This disposes of his reason for the \$10,000.00. Aside from that the whole of the right of way and pump house site embraced but 57.88 acres at \$50.00 an acre. On page 394, Mr. Kilbourne testified: "One of the first jobs we did was to make a survey of the land and find out where it was situated and furnish that very information to the Columbia River Orchard Company." Again on p. 396:

Q. What was your interest in the right of way for the canal?

A. I was acting as engineer for the Columbia River Orchard Company.

If this statement that DeLarm wanted the \$10,000 to pay for the pump house site and the right of way for the canals, was true, then he knew that it would take less than \$3,000 to pay for the land, and that DeLarm was giving a fictitious reason.

3. In April, 1911, he knew that a receiver had been appointed, Oscar G. Heaton, p. 228; E. C. Kilbourne, p. 402; but this didn't alarm him a bit. On pp. 402-3, he testified about his conversation in full with Heaton and that he gave Heaton a ten dollar check to collect the Kilbournes account, but he

doesn't explain what account he wanted collected. At this time the only accounts in the record the Kilbournes appear to have been interested in was the payment by DeLarm of the Moran account and the Dredging Co. account, and these two accounts were fully secured. Nor does he show what became of this transaction or whether he investigated it any further.

4. The identification of the copy of the Nott letter, Exhibit 142, p. 644, was sought to be made by E. C. Kilbourne at pp. 422-3. It took repeated efforts to get the witness to even examine the letter, and he evaded the identification in a petulant manner, and finally being asked:

Q. Do you deny the copy there is the copy of the one he wrote?

A. No, I don't deny that the moon was made of green cheese, either.

This Nott letter showed closely that they had been identifying themselves with DeLarm's bond trades, and it was little wonder he was trying to avoid its identification. Its being an unsigned copy sent to Hodges made it difficult of identification. But such a letter was sent and the language used in Mr. Kilbourne's letter of transmission, Exhibit 140, p. 643, is also significant and proves that they had assisted DeLarm in his bond trades. The purpose of the letter was to inform Nott that they wouldn't buy his land so that the way would be paved for Hodges to trade bonds for it. Attention has heretofore been

called to the fact that this copy bears internal evidence of its genuineness.

5. The manner in which E. C. Kilbourne sought to evade the statement of the amount they paid for the land, on p. 410, and his reference to Mr. Tobey, shows the character of his testimony whenever cornered for a definite statement.

Q. That is the gross amount that you agreed with Mr. DeLarm on?

A. We didn't do it in figures; we said we would take the ranch and do so and so, and he would do so and so, and we didn't reduce it to figures at all; the consideration wasn't in dollars; he wasn't paying us in dollars; he was paying us in a ranch, and you could call it \$140,000 as Mr. Tobey did once, or \$100,000 as he did once, or \$75,000 or \$80,000 as he did once.

6. E. C. Kilbourne, in his testimony on p. 373, had to take a fling at the Tobey's man: "and they, prepared a meal for us of which I ate only about crackers, *the only thing I saw fit to eat there.*"

7. It was shown by J. H. Edwards, pp. 195-6, that E. C. Kilbourne had come in to the bank and talked with him about the affairs of the Columbia River Orchard Co.; but on pp. 398-9, Mr. Kilbourne tried to make it appear as though this had been just a casual conversation. Yet he said to Mr. Edwards in reference to the project in a general way: "that he was glad to know that the Trust Company and the City

was inclined to take hold of good industrial enterprises, things which would help to develop the country," and this conversation was with reference to DeLarm's operations.

This fact, along with the others, shows that Mr. Kilbourne was keeping close tab on the affairs of DeLarm and his corporations.

8. The \$43,000 account accrued in July, 1910, and from that time to the 4th of March, 1911, they had received very little pay on the account. During this eight months Dr. Kilbourne would have us believe that they paid but little attention to the affairs of DeLarm's corporation. The Kilbourne Clark Co. was hard up and in fact went out of business December 31, 1910, on account of hard times. We could presume it to be a fact that the Kilbournes were keeping pretty close watch of DeLarm and Biehl and their corporations and be clearly within the evidence in this case, notwithstanding their protestations of ignorance.

9. By the payment of \$10,000.00 to DeLarm for the release of the agreement to construct the second unit, they knew, if their testimony on this point is to be taken as true, that they were thereby jeopardizing the final construction of the second unit and were thereby lessening the value of the bonds, if they thought the bonds were good.

10. What did E. C. Kilbourne pay for his interest in the Tobey ranch?



It was conceded by the defendants all through the case that the two Kilbournes owned the ranch as partners. E. C. Kilbourne testified, as heretofore shown, that he and C. A. Kilbourne agreed to assume the \$4,000 debt to the Kilbourne & Clark Co., and to finish the plant and to build the second unit. They haven't paid the \$43,000. C. A. Kilbourne borrowed the money on the land to finish the construction of the plant and to pay DeLarm the \$10,000.00 and it does not appear that E. C. Kilbourne is bound in any way to pay this except as it might be assumed from its being in the shape of a mortgage on the place. E. C. Kilbourne, however, testified that they put up the Glover ranch to secure the payment of the Puget Sound Bridge & Dredging Co. account. But the things that were traded for that land was \$2,950 owed to C. A. Kilbourne and some items of machinery. But it doesn't appear whether this belonged to the Kilbourne & Clark Co. or to the Kilbournes or to which one of them. C. A. Kilbourne testified that E. C. Kilbourne was to have an interest in the land in proportion to what was coming to him from the Kilbourne & Clark Co., p. 496, but what this proportion was they don't presume to say.

The payment for the interest of E. C. Kilbourne in the land stands in this predicament so far as the evidence is concerned:

He has an interest in the land as a partner. There

is a conflict in the evidence between him and C. A. Kilbourne as to payments for that interest.

There is no definite or certain amount shown that E. C. Kilbourne paid for his interest.

E. C. Kilbourne sets up the defense along with C. A. Kilbourne that he is an innocent purchaser for value. The law places the burden on him to make this defense good, and in doing so it imposes on him the duty to make full and complete disclosure of all the circumstances. This he has not done, but has evaded it and we have a right to take advantage of this fact and say to the Court, that these facts in themselves defeat his claim to be an innocent purchaser for value without notice.

11. C. A. Kilbourne testified, p. 497, that every claim against the Kilbourne & Clark Co. had been paid and the Court so found in the memorandum on the merits, p. 73. But the evidence shows that it has not been paid, but only secured by the Glover land, and this was not done until the following July, when the bonds of the Columbia River Orchard Co. were selling for but a few cents on the dollar.

12. The Kilbournes would not accept bonds for their pay.

Biehl testified, p. 358:

“Oh, yes, they couldn’t consider bonds. They needed cash for their business. They were not bankable at that time.”

E. C. Kilbourne testified concerning bonds, pp. 3923-:

Q. Now, before we leave this branch of the subject, I will ask you whether Mr. DeLarm, in all your negotiations, ever tendered you bonds in payment, or asked you to take them?

A. If he did, it was never considered. I don't remember that he ever did. He may possibly, but—

Q. But you don't remember?

A. No.

Q. Why wouldn't you consider it?

A. Well, it is a fixed policy of our company not to do it, and the company was short of money and couldn't do it; that is the Kilbourne Clark Company. They have to have money to carry on transactions, and Mr. Kilbourne was advancing money all the time to carry on these, and to continue other irrigating.

C. A. Kilbourne testified concerning taking bonds, p. 507:

Q. Did you ever have any of these bonds offered to you in payment?

A. Never presumed to offer us bonds at all. He knew that we were not able to carry bonds, couldn't take our pay in that way, and he never offered them.

But when DeLarm traded the bonds for tangible property, they were very willing to take that property. Although they must have cash, according to the story of the Kilbournes, they got no cash out of the Te-

boy ranch, and so were in no better situation for cash than they would have been had they taken bonds for what was due them and quit further work.

According to their story, the money received from the mortgages on the land was practically all paid out on the project and on the Glover land.

DeLarm never *presumed* to offer them the bonds. We can only infer from this language that DeLarm, knowing the bonds were worthless, supposed that the Kilbournes also knew this, and C. A. Kilbourne, knowing that DeLarm knew the Kilbournes either knew or suspected that the bonds were worthless, testified as he did, and hence he, DeLarm, never *presumed* to offer what he knew would not be accepted.

The Kilbournes knew the kind of security that was in the hands of the Oregon & Washington Trust Co., and that were behind these bonds, and they knew that those securities could not be sold in case of default in payment of the bonds or on the interest. They knew as securities behind the bonds, they were worthless and that the clause in the bonds, stating that they were backed by good (valid and solvent securities, was a fraud upon the bond buyers. However much they might think these mortgages might be made good in the future, they knew at the time of the Tobey deal not one cent could be realized upon them. See Exhibit 25, p. 565, Trust Agreement. They had an assignment themselves of \$152,000 of these desert land mortgages, and knew that these same mort-

gages or a considerable portion of them were in the hands of Hodges, the trust officer, and that Hodges was inquiring about others. Exhibits 140-141, p. 643. While this letter was written in June, 1911, we were unable to learn when these mortgages had been surrendered.

At this point we desire to recall attention to the language quoted from *Morrow Shoe Co. vs. N. E. Shoe Co.*, quoted in paragraph X of the law part of this brief, and especially to call attention to the concluding sentence: "If, on the whole case, strong doubts of the integrity of the transaction exist, the prior rights of Davis' creditors will prevail."

So in this case, taking the circumstances as a whole, we think that not only strong doubts are cast upon the bona fides of the transactions between the Kilbournes and DeLarm; but that the evidence shows that the Kilbournes were parties with DeLarm and knew all about his whole transactions, had knowledge of the fraud and profited by it.

The language in Paragraph X, quoted from *Zimmerman vs. Bannon*, 77 N. W. 736, is especially applicable here. Shutting out all the documentary evidence and the implicating facts and taking the oral statements of the Kilbournes as gospel truth, the Court would find them to be innocent purchasers for value; but when all the facts and circumstances are taken into consideration and the whole environment taken into consideration, then it becomes apparent



that the Kilbournes' outward form, though from their own testimony apparently honest and virtuous, is really but a mask to hide their participation in the fraud that was not only practiced upon the Tobeyes, but upon others as well.

We respectfully submit that the case should be reversed and a decree entered here granting the appellants the relief prayed for in the bill.

Respectfully submitted,

A. C. WOODCOCK,

E. R. BRYSON,

R. S. SMITH,

JOHN M. WILLIAMS,

LOUIS E. BEAN,

Attorneys for Appellants.



United States  
Circuit Court of Appeals

For the Ninth Circuit

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Appeal from the United States District Court for  
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Appellees' Brief

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C. E. S. WOOD,  
ERSKINE WOOD,

*Proctors* for Appellees.

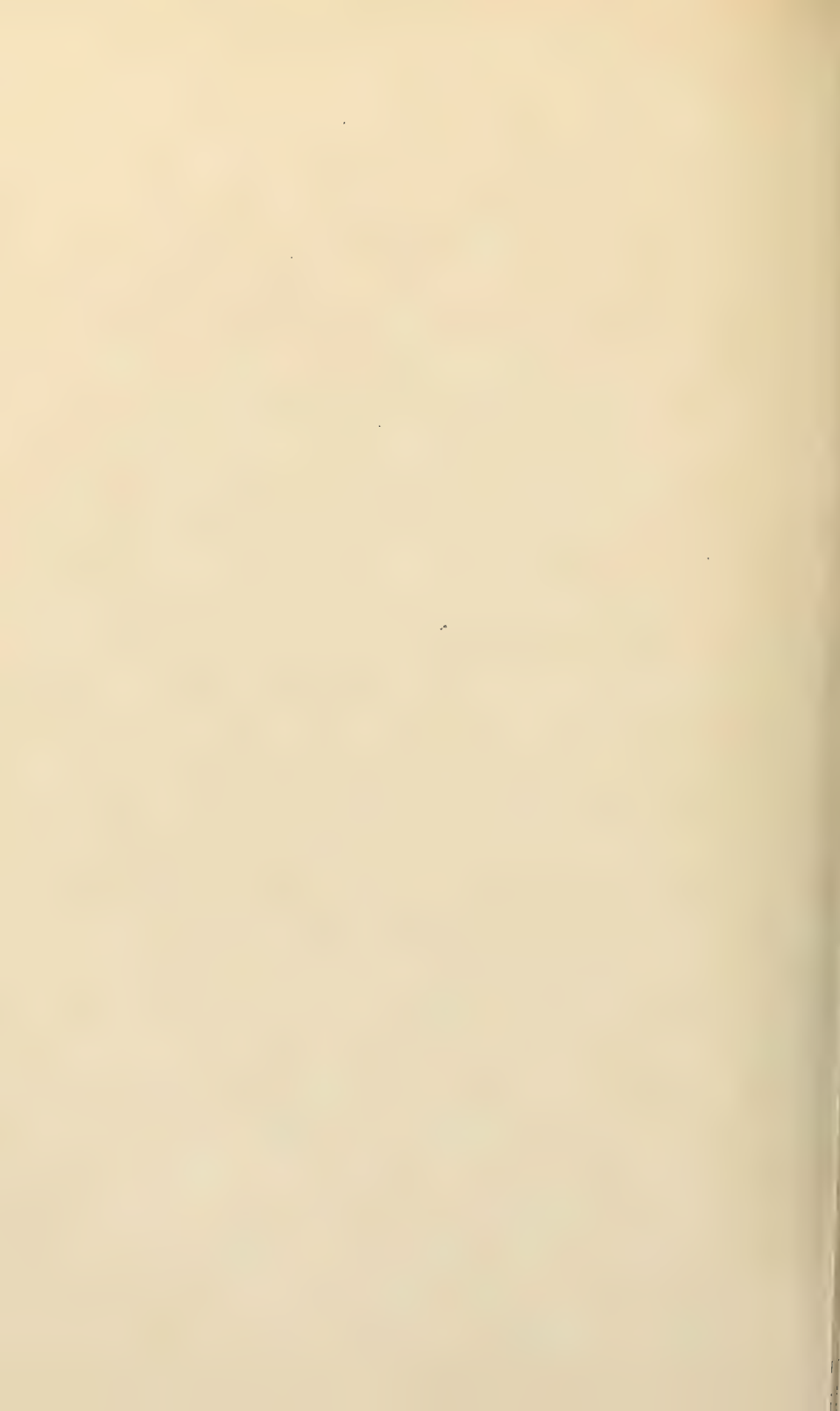
*Solicitors*

A. C. WOODCOCK,  
E. R. BRYSON,  
R. S. SMITH,  
JOHN M. WILLIAMS,  
LOUIS E. BEAN,

*Proctors* for Appellants.

*Solicitors*

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No. 2531

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Statement of the Case

This case in a nutshell is as follows:

The Tobey's were country merchants at Olex, Oregon in the dry farming wheat district of Gilliam County. They owned about four thousand acres of land there. Discouraged by several years of poor crops and desirous of leaving that country, they traded their four thousand acres of land for



some irrigation bonds which they knew to be more or less of a speculative character. This is plain enough from the fact that their ranch, with the equipment, was worth in the neighborhood of sixty thousand dollars, and they got in exchange for it one hundred and forty thousand dollars in bonds. The irrigation project failed, the bonds became practically valueless, and the Tobeys tried to get their land back by bringing this suit, charging fraud against the Kilbournes, who had succeeded to the title to the land. The man to whom the Tobeys traded the land for the bonds was DeLarm, the promoter of the irrigation project. The Kilbournes bought the land from DeLarm and paid a valuable consideration in full, without notice of any fraud.

The foregoing is the briefest possible statement of the case. A more detailed history of it follows:

Defendants E. C. Kilbourne and C. A. Kilbourne were the principal stockholders in a corporation known as the Kilbourne & Clarke Company, a Washington corporation, with headquarters at Seattle, engaged in the business of furnishing electrical supplies and machinery and installing pumping plants for various irrigation projects. DeLarm and Biehl were the principal stockholders in a corporation known as the Columbia River Orchards Company, which had an irrigation project at Wahluke, on the upper Columbia River. Their plan was one quite common in the irrigation business

when that was flourishing a few years ago. They entered into contracts with settlers by which the settlers agreed to pay a certain amount per acre for water and to mortgage their lands or desert land filings as security in payment for the water. DeLarm and Biehl then attempted to finance the project by issuing bonds with these "water mortgages" and some real estate of their own at Wahluke as security. DeLarm was apparently a smart, energetic man who inspired confidence in all whom he came in contact with. Biehl was more or less of a nonentity. DeLarm was the real head. The project was feasible and meritorious and there is no doubt that for some time DeLarm was perfectly honest and proceeded along the recognized lines of business in financing and executing projects of this kind. He issued three hundred thousand dollars of bonds and had one of the best trust companies in Seattle act as trustee. It was the trust company connected with Dexter-Horton National Bank. At this time everything was square and above board. It was later on, probably in the latter part of 1911, that DeLarm went wrong and swamped the project by issuing unlimited bonds against it, and, according to the undisputed testimony in this case, forged securities for the bonds and generally went to the bad. He is reported to have died some place in California while evading search by the Federal authorities, who wanted to prosecute him for use of the United States mails to defraud. Biehl,

his partner, was so prosecuted and convicted. So much for the DeLarm side of the case.

Reverting now to the Kilbournes, DeLarm made a contract with their company, the Kilbourne & Clarke Company, by which that company was to build the pumping plant at Wahluke. This was early in 1910, long before DeLarm went crooked. The contract contemplated erecting a concrete pumping station and installing the necessary machinery therein, including the pipes leading from the Columbia River up to the irrigation ditch, but did not include building any irrigation ditches. That part of the work was let to another contractor named Fox. Before going ahead with this contract, the Kilbournes went to DeLarm's office and asked for a statement of his financial resources. DeLarm showed them a statement of assets approximating nine hundred and sixty thousand dollars and against this, as liabilities, three hundred and some odd thousand dollars, leaving the approximate net assets at, say, six hundred thousand dollars. The three hundred thousand dollars of liability was the authorized bond issue already mentioned, and this DeLarm represented to be practically sold to a bonding house in Chicago. The Kilbournes verified the statement about the bonds by inquiring from A. L. Funk & Company, who were the Seattle agents for the Chicago bond house, and A. L. Funk & Company confirmed DeLarm's statement that the bond issue was practically sold and

only a few small details as to securing a right of way for ditch and clearing up some titles remained to be done before the money would be realized.

The Kilbournes, satisfied with their investigations, and inspired with full confidence in DeLarm, then commenced work under their contract to construct the pumping plant, and did about ten thousand dollars' worth of work. For this DeLarm owed them five thousand dollars then and five thousand Columbia River necessitated going ahead with the work night and day under full pressure. They had dollars due next month when a sudden rise in the a talk with DeLarm and although he had not made the earlier payments as had been expected, he convinced them that he would very soon have the money, and they decided to go ahead with the contract and protect the work against the rising water. They did so until they had expended about forty-seven thousand dollars against which DeLarm had made some payments, reducing the net amount owing to the Kilbournes to the sum of approximately \$43,000. In this state of affairs, the work having been protected against the high water, the Kilbournes, in July, 1910, shut down work because DeLarm could not pay them as the work progressed, as had been contemplated in the contract. The Kilbournes kept a watchman on the job and did a little work here and there until September, 1910, but practically they shut down in July of that year.

It should be noted in passing that under the pressure of work, due to the high water, when the



Kilbournes had strained every resource to keep things going, they had employed the Puget Sound Bridge & Dredging Company, as a sub-contractor, to do the excavation and erect the pump building, and had also employed the Moran Company as a sub-contractor, though in a comparatively minor capacity. The result of the shutdown in July was the Kilbournes were left owing the Puget Sound Bridge & Dredging Company and the Moran Company some twenty-five thousand and twenty-five hundred dollars, respectively. These amounts are approximate. It is necessary to know this in order to understand some of the later transactions.

In February, 1911, DeLarm came to E. C. Kilbourne and said that he had contracted to purchase about five thousand acres of land in Oregon, that he thought it afforded the basis for a fine irrigation project because the land was cheap and could be watered by gravity flow instead of by pumping and he requested Dr. Kilbourne to come with him and examine it as a soil expert and irrigation engineer. This land was the Tobey ranch. Dr. Kilbourne went with DeLarm and they were joined in Portland by W. L. Tobey, and proceeded to the ranch in Gilliam County, Oregon, examined it, particularly with a view to its being watered from Rock Creek, and Dr. Kilbourne returned to Seattle.

About the 6th of March, 1911, DeLarm came to Dr. E. C. Kilbourne and asked him if he wouldn't take the Tobey ranch in payment for the Kilbourne



& Clarke Company's debt of forty-three thousand dollars and going ahead and finishing the plant at Wahluke. The Kilbournes wouldn't do this at first, but on the 8th of March reached a tentative understanding with DeLarm that they would take the ranch over as security for the claim of the Kilbourne & Clarke Company and for the expenses they would incur in finishing the plant. But a little later they abandoned this idea, and finally reached the following agreement with DeLarm: E. C. Kilbourne and C. A. Kilbourne agreed to assume, as individuals, the indebtedness of forty-three thousand dollars, which DeLarm owed the Kilbourne & Clark Company, and further agreed, as individuals, to complete the pumping plant at Wahluke (the cost of completion being estimated at sixteen thousand dollars), and to install a second pumping unit at any time within a certain period, when demanded to do so by DeLarm. The Kilbourne & Clarke Company had gone out of active business December 31, 1910, and the agreement by the Kilbournes, just outlined, was made by them as individuals. DeLarm on his part agreed to turn over to them the Tobey ranch and equipment and to pay seventy-five hundred dollars on the Puget Sound Bridge & Dredging Company account and to pay the Moran Company's account, amounting to about twenty-two hundred dollars, both of these accounts being debts for which the Kilbourne & Clarke Company, as well as DeLarm, was liable, and the Kilbournes agreed that when DeLarm paid these accounts of the Dredging

Company and the Moran Company the Kilbournes would release two pieces of property in Tacoma which DeLarm had given the Kilbourne & Clarke Company as security.

In the meantime the transactions between DeLarm and the Tobeys, of which the Kilbournes knew nothing at that time, but which appear in the evidence in this case, were as follows:

DeLarm had offered the Tobeys one hundred and twenty thousand dollars of the irrigation bonds in exchange for their ranch and equipment. W. L. Tobey, the elder and leader of the two Tobeys, made a trip to Seattle to investigate the bonds and found that the bonds were generally regarded in Seattle as good, though of a speculative character, and was told by a bond broker named Gunn, to whom he was referred by DeLarm, that the company had enough property to pay out about eighty or eighty-five cents on the dollar on the bonds. With this information W. L. Tobey went to DeLarm and said that if he traded for the bonds he would have to have thirty-five dollars an acre for his ranch instead of twenty-five dollars, which had been the asking price theretofore. DeLarm regarded this as too much for the land, and after some haggling back and forth agreed to give the Tobeys one hundred and forty thousand dollars in bonds, as payment for the ranch and equipment, and the Tobeys accepted this offer. It was also a part of this bargain that DeLarm should lend the Tobeys six thousand

dollars and take back as security twelve thousand dollars in bonds.

To carry out this deal the parties met in Portland on March 15, 1911. There were present the Tobeys, DeLarm, one of DeLarm's men named Hodges and E. C. Kilbourne, the latter having come down from Seattle the night before. When it came to executing the deeds, DeLarm explained to the Tobeys that he was transferring the land to the Kilbournes in payment for the pumping plant complete, and requested the Tobeys therefore to make the deeds out direct to E. C. Kilbourne, which they did. The same thing was done with the bill of sale of the personal property. It was made direct to E. C. Kilbourne, all the parties being present, all acquiescing, and the Tobeys understanding exactly what was being done and why it was being done. The deeds, after being made out to E. C. Kilbourne, were, with the bonds, put in escrow in Hartman & Thompson's bank, pending the making of the loan of six thousand dollars to the Tobeys, which was part of the agreement, and also pending some little fixing up of the title, and were delivered out of escrow to E. C. Kilbourne on March 24, 1911.

Dr. E. C. Kilbourne shortly after deeded the property to his partner, C. A. Kilbourne, partly for convenience in making the mortgage to Balfour, Guthrie & Company, hereinafter mentioned, and partly because C. A. Kilbourne had advanced about seventy-two thousand dollars to the Kilbourne & Clarke Company, and it was felt that it should

therefore go to him, although E. C. Kilbourne still had an interest in the property in proportion to the money which he, too, had coming from the Kilbourne & Clarke Company (p. 496). It is not pretended by us that C. A. Kilbourne stood in any different relation as far as being an innocent purchaser than did E. C. Kilbourne. They were partners and what one knew the other knew, and for the purposes of this case they may be considered as holding the property together.

The Kilbournes then immediately started to work to complete the pumping plant and did complete it all but a small section of the intake pipe, which they postponed completing until the water should fall in the Columbia River and afford a better opportunity for doing it. They completed the pumping plant, with the exception of this small part of the intake pipe, in June, 1911, and the cost of the completion was seventeen thousand dollars, in round numbers, in addition to the forty-three thousand dollars already spent. To obtain the money to complete the plant, the Kilbournes mortgaged the Tobey ranch to Balfour, Guthrie & Company for twenty thousand dollars. They tried to obtain a loan of thirty-two thousand five hundred dollars, but Balfour, Guthrie & Company appraised the ranch at fifty-two thousand dollars, and the most they would lend the Kilbournes on it was twenty thousand dollars.

In September, 1911, DeLarm came to E. C. Kilbourne and said that he was anxious to get some



money to pay for the right of way for the ditch and for some land of the Northern Pacific in the project, and that he also wanted to do something to get the Puget Sound Bridge & Dredging Company to release the lien which they had put on the pumping plant, and that the Puget Sound Bridge & Dredging Company wouldn't accept anything but cash. DeLarm therefore proposed that the Kilbournes place a second mortgage of seventeen thousand five hundred dollars on the Tobey ranch and that of this seventeen thousand five hundred dollars ten thousand dollars should go to DeLarm in consideration for which he would release the Kilbournes from their obligation to install the second unit and from their obligation to complete the intake, the completion of which, it was estimated, would cost from one thousand to fifteen hundred dollars, and DeLarm further proposed that the seventy-five hundred dollars remaining of the money realized by the second mortgage should be paid to the Puget Sound Bridge & Dredging Company, and they would then release their lien, and DeLarm said he knew a party who would take the second mortgage and named him—Mr. Alexander Wakefield. The Kilbournes accepted this proposition. They were really out of the contracting business now and were therefore willing to pay the ten thousand dollars to be released from their obligation of installing the second unit and to complete the intake. The seventy-five hundred dollars due the Puget Sound Bridge & Dredging Company the Kilbournes



were primarily liable for, anyway, and though it was in the final analysis a debt of DeLarm's and one which he had agreed to take care of, yet the Puget Sound Bridge & Dredging Company was threatening to take a judgment against the Kilbourne & Clarke Company, and rather than have this the Kilbournes were willing to pay the seventy-five hundred dollars to the dredging company and to look to DeLarm for its ultimate repayment to them. Therefore, the mortgage was made by C. A. Kilbourne to Wakefield, and Wakefield placed it of record. Wakefield, following the usual custom of mortgagees, refused to pay over any money until the mortgage was placed of record, but when it was placed of record he did not pay over all the money. Apparently (the evidence is not very clear on this) Wakefield paid DeLarm some of the ten thousand dollars, but not all, and compelled DeLarm to take a heavy discount. The seventy-five hundred dollars, which was to have gone to the Kilbournes to pay the Dredging Company, never was paid by Wakefield, and he still owes it, although the Kilbournes consulted their attorneys, McClure & McClure, of Seattle, and instructed them to do everything they could to get the money. The result, therefore, of these transactions was that the Kilbournes placed a second mortgage on the ranch of seventeen thousand five hundred dollars, obtained a release from completing the second unit and completing the intake, but were left still owing

the Dredging Company the seventy-five hundred dollars.

Early in 1912 DeLarm's bubble burst. At that time it was a surprise to everybody—the Kilbournes and the Tobey, as well. As we look back on it now, with the evidence adduced in the government prosecution against Biehl and the evidence in this case before us, we know that DeLarm had gradually been going from bad to worse, had been led from one false step to another, until he swamped his irrigation project with an unlimited issue of bonds, forged securities, and finally, sometime in 1912, became a fugitive from justice. It must always be remembered, in considering this case, that DeLarm started out honestly, that his deception and decline were gradual, and that at the time of the Tobey deal his bonds were actively traded in in the Seattle market, largely for property, it is true, and not for cash, but still extensively traded in and regarded as of good value, though, of course, like all irrigation bonds, speculative. It was not until later that he ruined himself and his business by issuing bonds in unlimited quantities.

At the end of January, 1912, when the Tobey found that their bonds were worthless, they consulted their lawyer and the result was this suit, in which they charged the Kilbournes with having been co-conspirators with DeLarm in a gigantic scheme to defraud. We think your Honors will con-

clude, after reading the evidence, that the only reason the Kilbournes are charged with fraud is that they happened to be the ones who now own the Tobey lands and the Tobeys cannot get their lands back without crying fraud against the Kilbournes. So far as any evidence goes connecting them with such fraud, we think your Honors will agree with Judge Bean that none whatever has been shown.

The Kilbournes, in the meantime, had bought thirteen thousand dollars' worth of new equipment for the ranch and improved its cultivation, and yet had made nothing, but had sustained a loss, as appears from C. A. Kilbourne's testimony (pp. 507-509, and Defendants' Exhibit V, p. 684).

## Argument

Any extended argument of this case, after the full statement we have made, seems unnecessary, and after your Honors have read the testimony of the two Tobeys and the two Kilbournes and Judge Bean's opinion, we doubt whether you will feel the necessity of reading this argument. One or two things we should like to mention, however, which seem to come more fittingly in the argument than in the statement of the case, and they are these:

It is vital to a correct understanding of this case to get a mental picture of how things looked to the Kilbournes and the Tobeys and the other participants back in 1910 and 1911 and not form a picture by everything that we know now. It would

be the greatest mistake to take all the evidence which the United States' special agents dug up in the prosecution of Biehl and of which the Tobey's counsel had the benefit in this case, to take the forged securities, the unlimited issue of bonds, the failure of the Wahluke project, the disappointed bondholders and the disappointed settlers, like the Koppens, who had expected water on their lands and a thriving irrigation community to grow up about them—it would be a great mistake to take all these things which we know now, but which were all in the future in 1910 and 1911, and from them to make our mental picture and say, "The fraud is obvious and the Kilbournes must have known it." We must get back to 1910 and 1911 and see how things looked then. Your Honors all know the great popularity which irrigation projects of every kind had enjoyed for ten years previous to that time, a popularity which, to the far-sighted man, might have seemed destined to wane, but in 1910 was still vigorous and believed in by nearly everybody. The Kilbournes were the construction engineers for many pumping plants for irrigation throughout the Northwest and they had found the business successful and profitable, though later it collapsed. DeLarm came to them, a bright, energetic young man, with an irrigation scheme which, in spite of all its vicissitudes, is still recognized to be perfectly feasible. Better to understand all of the Kilbournes' actions throughout this case, it is necessary to know something of the character of DeLarm. It is the universal testi-



mony of all who came in contact with DeLarm that he inspired great confidence. Even W. L. Tobey, the chief plaintiff in this case, says: "Mr. DeLarm impressed me quite favorably, being a bright young man, a man that inspired confidence. I had a great deal of faith in him from talking with him" (p. 101). Again he says: "Because in talking with DeLarm and with the other people that I met (referring to this trip of investigation to Seattle) they impressed me as people that were square and honest and I had faith in what they were saying" (p. 125). His brother, F. L. Tobey, says the same, that he took them to be "honest, reliable men" (p. 340). E. C. Kilbourne says that "Mr. DeLarm inspired perfect confidence" (p. 440). C. A. Kilbourne says that he certainly had a good deal of faith in Mr. DeLarm—"He impressed me very favorably, indeed" (p. 519). Again C. A. Kilbourne testified on cross-examination as follows: ,

"Q. From the experience you had had with DeLarm up to that time (the time of the Wakefield mortgage in September, 1911), you had found out he wasn't very prompt in his payments?

A. Mr. DeLarm's promises were seldom carried out. Whatever he put out as statements of facts to us whenever we made any attempt to verify it, was always borne out. We never caught DeLarm in a deliberate lie, and we had a good deal of confidence in him.

Q. Well, you did find out along the line, though, that a whole lot of those statements were not true?



A. Not what he put out as statements of facts to us. Everything we investigated—for instance, when he borrowed \$3,000 from the company, he said he would have that money come back in a certain time. We went and investigated and found it to be so. He said the Washington Trust Company was the trustee; we found that to be so. He made a great many promises that he never carried out, and still he had a way about him that up until January, 1912, I really believed the fellow was sincere and honest and would carry out his scheme” (p. 532).

It is apparent that DeLarm was more than ordinarily confidence inspiring. All who met him believed in him. As C. A. Kilbourne said, “he had a way with him.” And the extent to which the Kilbournes trusted him is shown by the fact that they were willing to expend forty-seven thousand dollars in erecting the pumping plant at Wahluke, though during that time they were paid only about four thousand dollars, so that in effect they extended a credit to DeLarm of forty-three thousand dollars, and at another time actually loaned him in cash twenty-nine hundred and fifty or three thousand dollars (pp. 511 and 532).

This young man then came to the Kilbournes with an irrigation project, which is still recognized to be inherently a good one, explained his plan, which was one common in the irrigation business, namely, to issue bonds on the project, the security for the bonds being the “water mortgages” of the settlers on the project. That is, the settlers agreed

to pay one hundred dollars an acre for water, and gave mortgages on their lands or their desert filings as security. And these, together with some land owned by DeLarm's company, were the basis for the bonds. It was a plan of action which has been followed in almost every private irrigation project that has been successfully carried through in this country. It was reported on favorably by the engineer of the Chicago bond house. The bond house agreed to take DeLarm's issue of three hundred thousand dollars of bonds on DeLarm's compliance with certain minor requirements, and on this showing the Kilbournes agreed to build the pumping plant. Thenceforth they did not investigate DeLarm. They were the engineers to build the plant, and they went ahead with that. They knew nothing about his financial arrangements or his bond issue, after their first investigation when they found that three hundred thousand dollars in bonds had been authorized, and they supposed to the last that this three hundred thousand dollars in bonds was the total issue. When they had spent ten thousand dollars on the plant and DeLarm failed to make the payments according to the contract, it might be supposed that they would shut down. But the rising water in the Columbia made going ahead preferable, and DeLarm showed them how he would have the money to pay them, and they believed in him and went ahead. When they had gone ahead to the extent of forty-three thousand dollars and shut down work in June, 1910, because

DeLarm was unable to pay them, they still had the utmost confidence in the irrigation project and in DeLarm himself. They knew he was hard up, of course, but believed in him and in his ability to carry the project through eventually and never for a moment suspected his integrity. Indeed, at this time it is probable that DeLarm was absolutely honest and had not yet entered on his fraudulent practices.

If we have been successful in presenting to your Honors' minds a mental picture of this young man DeLarm—how he exacted confidence from all who met him—and if we have made you understand that the irrigation project which he had was really a good one and is still a good one today, if anyone will carry it out, we feel that we have made your Honors understand how the Kilbournes, after their first investigation of the project and of DeLarm's resources, never concerned themselves again with DeLarm's financial operations or bond issue, but accepted them as being honest as a matter of course, and went ahead with their own part of the work, namely, building the pumping plant; and let us state here, parenthetically, that they did build a good one. Not even the Tobeys deny that. Why should the Kilbournes have suspected DeLarm any more than the Tobeys did? W. L. Tobey is no child. He is a man well able to look after his own affairs, and he went over to Seattle in 1911 and made a careful investigation of DeLarm and his bonds, and having perfect confidence in DeLarm and believing

that his bonds would pay out at least eighty cents on the dollar, made his trade. And with one hundred and forty thousand dollars of those bonds in his hands—his whole fortune, as he testified, tied up in them—he rested perfectly easy all through the year 1911, perfectly confident that the bonds were good, and didn't discover that they were not good until January, 1912. If the Tobeyes felt this way about DeLarm and his bonds, why should the Kilbournes have felt any <sup>difficulty</sup> ~~difficulty~~? Why does counsel argue that the Kilbournes must have had such an acute knowledge of the fraud? The answer is, they had as much confidence in DeLarm as the Tobeyes did; they didn't think they were dealing with a trickster.

#### THE AGREEMENT OF THE KILBOURNES TO COMPLETE THE PLANT WAS THE VERY THING WHICH WOULD MAKE THE BONDS GOOD.

Another thing that we should like to point out to your Honors in this case is that though DeLarm had had difficulties with his project and it had dragged for lack of cash, yet it was the very Tobey deal itself which was expected to remove those difficulties and make everything smooth sailing thereafter. And the reason the Tobey deal was expected to do this was because when the Kilbournes agreed to complete the pumping plant for the Tobey lands that would put the water in the ditches and would make the project a go and the bonds good. DeLarm



would then have carried out his contracts with the settlers, the project would be complete and the water mortgages on which the bonds were based would be good securities. The Tobeys understood this as well as anybody. DeLarm explained to the Tobeys on the 15th of March, the very day the deeds were executed, that he was turning over their land to the Kilbournes in payment for the completion of the pumping plant (p. <sup>137, 145, 142</sup>402). In the words of E. C. Kilbourne: "I thought the company was now in good shape and would go right ahead and would be all right and a success." Referring to this statement, the Tobeys' counsel asked E. C. Kilbourne this question: "Now you said that you thought that now the enterprise would be a success. What did you mean by 'now'? What day or transaction do you refer to as making a success"? And Kilbourne answered: "The contract with E. C. and C. A. Kilbourne to complete the plant so that they could put the water in the ditch. Everything hinged on putting the water in the ditches" (pp. 403 and 404).

Touching this same point E. C. Kilbourne testified as follows: The opposing counsel had been trying to show that the Kilbournes knew DeLarm was hard up for cash—a thing they never denied. This testimony followed on redirect (p. 441):

"Mr. Wood: There is one thing I might help opposing counsel in.

Q. You shut down work as the Kilbourne-Clark Company because you didn't get paid?

A. Certainly.



Q. And you knew you didn't get paid because they didn't have money, didn't you?

A. Sure.

Q. And you knew they were hard up?

A. Yes.

Q. And you supposed when you started your work and the water was going, that was the end of the difficulty?

A. Yes."

## AT THE TIME OF THE TOBEY TRADE THE BONDS HAD A GOOD VALUE.

It must never be forgotten by your Honors that DeLarm's frauds and delinquencies and his unlimited bond issues occurred after the Tobey deal, and that, at the time he exchanged bonds for the Tobey lands the bonds had a real value and were taken by many reputable Seattle business men in exchange for real estate. They were considered generally at that time as good.

## DISCUSSION OF SOME POINTS OF LAW RAISED BY APPELLANT.

Counsel for appellants has twelve points of law in his brief. We do not deem it necessary to discuss all of these, but one or two we should like to discuss, more particularly in respect to their application to the facts in this case.

### APPELLANTS' POINT III.

"One who purchases merely an equity cannot be a *bona fide* purchaser. The doctrine of *bona fide* purchaser is not applicable to the purchase of an equity."

This is a correct statement of the law, but has no application to this case where the Kilbournes became the holders of the legal title.

APPELLANTS'	“Where, under or by virtue of
POINT IV.	the assignment of a contract or
	option procured by fraud or by
	direction of the defrauding
	party, the deed is made direct to
	a third person, such third person
	will not stand in any other or
	better situation than the de-
	frauding party, and cannot be re-
	garded as an innocent purchas-
	er.”

Citing

*Torrey v. Buck*, 2 N. J. Eq., 366;

*Seibel v. Higham* (Mo.), 115 S. W. 987, 129  
Am. St. Rep. 510-11;

*Bonelli v. Burton*, 61 Ore. 429.

*Torrey v. Buck* was decided in 1840, and so far as we can find has never been cited since to sustain the position taken by counsel. And there is not a single authority cited in the opinion itself to sustain that position. The Chancellor, without any discussion, simply declared that the fact that Hamilton's name had been inserted in the deed could not constitute him a purchaser for value without notice. Even if this decision be taken as correct, we point out the following points wherein it differs from the case of the Kilbournes: In the *Torrey* opinion it is *nowhere stated* that Hamilton *was* without notice of the fraud practiced by Buck. Nor does

that appear to have been the defense. It is worthy of note that Buck and Hamilton *joined* in an answer, the gist of which was that Torrey had had ample opportunity to investigate the stock he was trading his property for; that he, by his own admissions, knew it was a gamble; and that both defendants had refrained from telling him anything about the value of the stock when he asked them.

Another indication that the defendant Hamilton was actually a party to the fraud is that he himself furnished part of the consideration which proved worthless—the Trafton note—in which Buck was interested with him (though in fairness it should be stated that the court refused to hold the Trafton note fraudulent). The trend of the opinion, to our mind, shows that Hamilton and Buck were conspirators in the deal and that Hamilton knew of Buck's fraud.

Now, on the question of *bona fide* purchaser, all that the opinion says is that:

“The case has been embarrassed somewhat by the introduction of a third party, the defendant Samuel H. Hamilton, to whom the deed for the property, at the instance of Buck, was finally made by the complainant; and yet I do not see how it varies the case. The bargain was made between the complainant and Buck; this is admitted by the defendants' answers; and the deed made on such bargain, by direction of Buck (who had made a further contract with Hamilton), directly to him to avoid multiplicity of deed. Hamilton cannot claim, in such case, to stand in any other or better

situation than Buck would, had the deed been made to him. The conveyance is made on the contract entered into between the complainant and Buck, and the *mere substitution* of the name of another person, at the instance of Buck, cannot place that person in the situation of a *bona fide* purchaser without notice."

The "mere substitution." We agree with that. The "mere substitution" of Hamilton's name could not make him a *bona fide* purchaser. Other elements were necessary and these were apparently lacking. But *if* Hamilton had actually concluded a bargain with Buck to take the property, and actually paid for it and received a deed for it without notice of Buck's fraud, then we think there is no doubt he would have been a *bona fide* purchaser, even though the deed was made direct from Torrey to Hamilton. Otherwise, what becomes of the equitable doctrine that equity regards that as done which ought to be done? The court, to do equity, ordered that Hamilton be refunded all he had paid and restored to his former condition.

In the case at bar, if your Honors should restore to the Tobeys their lands, equity would require that the Tobeys save the Kilbournes harmless as to all that the Kilbournes have done, relying on the consent of the Tobeys to the deed (unless the Kilbournes are parties to the fraud). To be specific, it would require the repayment of the original consideration and the taking over at cost the lands subsequently acquired by the Kilbournes on the strength of their ownership of the Tobey land and



the expenditures in machinery and plant necessitated by their ownership of this land, and made in good faith.

In the case of *Seibel v. Higham*, a deed had been placed in escrow and the grantor died. The grantee never complied with the terms of the escrow and gave up any idea of taking the property. Long after the time of the escrow had expired, Higham, representing himself as the agent of the grantor, and never telling the escrow holder that the grantor was dead, obtained possession of the deed. Of course, the deed thus obtained was *void*, not merely voidable; it conveyed no more title to anybody than it would have if Higham had stolen it, as the court remarked. It would be enough to dispose of this case to point out that the pretended innocent purchaser deraigned his title through this *void* deed and as such a deed can convey no title to anyone, no matter how innocent he is, the case is not in point.

But counsel has quoted another part of the opinion and we will analyze that. Higham and a confederate named Meyer, holding under the void deed, gave an option to a man named Graham, who, being unable to pay the purchase price, transferred his rights under the option to Barnard (the innocent purchaser), who paid the price to Higham and Meyer and took a deed. Graham knew of Higham's fraud, Barnard did not. The court held Barnard not a *bona fide* purchaser, because he merely stepped into Graham's shoes and, using the rights of Graham's option, continued Graham's deal and



brought it to a consummation. But the court said that if Graham had *himself* completed the deal and then turned around and in a *new transaction* sold the property to Barnard, the case would have been different.

We do not approve of this reasoning. We think that Barnard (aside from the deed being *void*) should have been held a *bona fide* purchaser whether he continued Graham's transaction or bought from Graham as a new deal. But however that may be, it is obvious that this case is quite distinguishable from the case at bar for the reason that the Kilbournes were by no means the continuors of DeLarm's transaction with the Tobeys. DeLarm made his independent deal with the Tobeys and completed it all but the receiving of the deed. *He* paid the Tobeys the bonds, not the Kilbournes, and when he had closed the deal, with the exception of the delivery of the deed, he then turned around and made a new and distinct bargain with the Kilbournes, and in equitable effect took the deed, which the bill alleges was delivered to him, and delivered it to Kilbourne; in equitable effect being a reconveyance by him to Kilbourne, for equity looks at the intent, and this was the intent of all parties.

It seems to us that the Torrey case may be distinguished in the same way.

*Bonelli v. Burton*, 61 Ore. 429. It is enough to dispose of this case to say that the defense of a *bona fide* purchaser was not pleaded or relied upon at all. (See 61 Ore., p. 437, par. 9.)

For cases which hold that an innocent purchaser will not be deprived of that position because he took a deed direct from the defrauded person instead of through the channel of the defrauder, see

*McCleary v. Wakefield* (Iowa), 41 N. W. Rep. pp. 210, 211, first column.

*Hall v. Kary* (Iowa), 110 N. W. Rep. 930, 931.

*Augustine v. Schmitz* (Iowa), 124 N. W. Rep. 607.

*Clemmons v. McGeer* (Wash.), 115 Pac. Rep. 1081, 1082, 1083.

In these cases the original grantor was not present and acquiescing when the deed was filled in with the name of the innocent third party. How much stronger is the case at bar in favor of the Kilbournes, where the Tobeys were actually present and, being informed fully of the reason why DeLarm was transferring the land to the Kilbournes, consented to the deed being filled in with Dr. Kilbourne's name to save the trouble of making duplicate deeds.

If there is anything at all to the maxim that equity regards that as done which ought to have been done or was intended to be done, then your Honors must consider this case exactly as if the Tobeys had executed a deed in favor of DeLarm and DeLarm had in turn conveyed by deed to Dr. Kilbourne.

The whole reason why equity will not protect the innocent purchaser of a mere equity is because where the equities are equal, the one prior in time will prevail. But when the purchaser of an equity also acquires the legal title, without notice of fraud and for value, then he is protected under the maxim that equity follows the law, or where the equities are equal the law will prevail. A court of equity will act only on the conscience, and where the holder of a legal estate has acquired it for value and without taint to his conscience, a court of equity simply has nothing to operate on. (Warvelle on Vendors, 2d Ed., Sec. 606.) When he has acquired the legal title honestly it makes no difference whether the deed has come direct from the defrauded party or from the defrauder.

It seems to us that it is misconception of this rule which has led counsel into this discussion of the rights of purchasers of equities.

APPELLANTS'  
POINT V.

“Where fraud is proved, and the defendant relies upon a defense that he is a *bona fide* purchaser, he must allege and prove that he was a *bona fide* purchaser for a valuable consideration paid without notice of a fraud, or of such facts as would put a reasonably prudent man upon inquiry, and the burden is on him to prove it.”

This point raises the question of burden of proof, which is a very important question in this case, and necessitates a consideration of what the

bill in this case charges. It does not charge that DeLarm defrauded the Tobeys, and that the Kilbournes, though innocent of the fraud, knew of it when they took title to the lands and therefore cannot be innocent purchasers. That isn't what it charges at all. If it had charged that, the burden would be on the Kilbournes to show that they were innocent purchasers, but that isn't the theory of the bill. The bill is that the Kilbournes were active partners with DeLarm and entered into a conspiracy to defraud the Tobeys. The bill charges them with being active participants in the scheme to defraud and charges them with the fraud as directly as it charges DeLarm. If your Honors read the bill you will find these allegations: "That the said W. E. DeLarm, with his associates, including all of the defendants herein, except possibly W. J. Burns, *entered into a gigantic scheme to defraud your orators*, as well as all other persons with whom he and his associates dealt" (page 15). "That the defendants, W. E. DeLarm, Edward C. Kilbourne, Charles A. Kilbourne (and others, naming them), *conspired and confederated together for the purpose of defrauding your orators* and other persons with whom they dealt; that the said defendant, W. E. DeLarm, dominated and controlled said corporations made parties defendant hereto, as well as the individuals named herein as defendants, *and they were all instruments in his hands or acting with him for the purpose of perpetrating the frauds* which culminated in the transactions with which



they had been connected with your orators, as well as other persons” (pp. 15 and 16). “That the said Edward C. Kilbourne and Charles A. Kilbourne, to whom the said Edward C. Kilbourne conveyed the lands of your orators, knew at all times all about the business which was being conducted by the said W. E. DeLarm and all of the said corporations which are made defendants herein and *knew the whole scheme as well as W. E. DeLarm himself, and they were confederates with him in the business* and when the deeds were made and delivered to the said Edward C. Kilbourne he had knowledge of all the business in which the said W. E. DeLarm was engaged and was not at all an innocent purchaser, *and acted with the said W. E. DeLarm to induce your orators to convey the land to him as a trustee or agent for the said W. E. DeLarm and his company.*

“That no consideration at all whatever passed between the said Edward C. Kilbourne and your orators, but the deeds were made to the said Edward C. Kilbourne *with the express understanding that he was an agent and trustee of the said W. E. DeLarm,* with whom the original contract was made, *and was acting for him.* And the said Charles A. Kilbourne knew, at the time said deed was executed and delivered to him, of all the transactions” (pp. 16 and 17). Your Honors will see that the bill charges not that the Kilbournes took the land with knowledge of a fraud, in which they had had no hand, but charges the fraud directly against



them; says that they were in a confederacy with DeLarm to cheat the Tobeyes out of their lands.

Now, isn't the burden on the complainants to prove these charges? The complainants must win on the strength of their bill and their proof, or not at all. They cannot charge direct, active fraud against us and then, when they have failed in their proof, say that the burden is on us to prove ourselves innocent purchasers. They cannot do this even though the defense of innocent purchaser is set out in the answer. The complainants must recover on the case made in their bill, and no decree can be entered which is not *secundum allegata et probata*, and they cannot recover on the strength of their adversaries' answer.

“Every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill, otherwise the defect will be fatal. For no facts are properly in issue unless charged in the bill; and of course no proofs can be generally offered of facts not in the bill; nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence; for the court pronounces its decree *secundum allegata et probata*.”

Story's Equity Pleadings (8 Ed.), Sec. 257.

“The Decree Must be *Secundum Allegata*. The General Rule. Although the plaintiff may make out by proof a case which entitles him to relief, yet he can have no decree unless the allegations of the bill are adapted to the case proved, for the court pronounces its decree *secundum allegata et probata*. And it is said

that this rule is substantially adhered to with the same strictness in equity as at law.

“Admissions in Answer. No admissions in an answer can, under any circumstances, lay the foundation for relief under any specific head of equity, unless it be substantially set forth in the bill.”

Ency. of Pleading and Practice, Vol. 3, p. 357.

What proof is there of conspiracy and fraud on the part of the Kilbournes? The complainants combed the States of Oregon and Washington for evidence, and had all the advantage of the labors of the United States Secret Service in the Biehl case; with what result? Judge Bean sat through days of testimony wherein DeLarm was tried, but the Kilbournes were never touched.

It is elementary that the proof of fraud must be clear and convincing. Every presumption is in favor of innocence.

Mr. Justice Miller said in *Maxwell Land Grant Case*, 121 U. S. 325, p. 381; 7 Sup. Ct. Rep., p. 1029:

“We take the general doctrine to be that when in a court of equity it is proposed to set aside, annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt.”

See also *Lalone v. U. S.*, 17 Sup. Ct. Rep., pp. 74, 75, and *U. S. v. American Bell Telephone Co.*, 17 Sup. Ct. Rep., p. 809, and cases cited.

Suppose the defendants Kilbourne had moved for a dismissal at the close of complainants' case? Can your Honors feel that the proof that the Kilbournes had "conspired and confederated" with DeLarm to defraud the Tobeys was so clear as to warrant a cancellation of the Kilbourne deeds? And if not, has the testimony of the Kilbournes increased the proof of fraud? Obviously not.

The complainants have simply failed to establish the facts alleged in their bill. And they cannot win on any facts or defences set up in the answer.

Story's Equity Pleading, 8th ed., Sec. 264.

Ency. Pleading and Practice, Vol. 3, p. 358.

No defense of a *bona fide* purchaser was necessary.

This, we think, should dispose of appellants' point V.

Inasmuch, however, as the answer does, in effect, set up the defense of *bona fide* purchaser and we put the Kilbournes on the stand and had them tell their story and counsel says that we, as *bona fide* purchasers, must prove a valuable consideration paid without notice of a fraud, we ask your Honors to read the testimony of the two Kilbournes and then ask yourselves whether there can be any doubt about their having sustained the burden of proof that counsel says is on them. Every act they did shows their honesty, their belief in the success of the project and in DeLarm himself, and their entire absence of any suspicion whatever that DeLarm was

tricky. They have not only testified to this, time and time again, but their acts show it. Would they have spent forty-seven thousand dollars of their own money on the plant at Wahluke with payments of only four thousand dollars from DeLarm if they had thought he was tricky? Would they have loaned him three thousand dollars cash? Would they have written Glover, at the end of May, 1911, suggesting that he see whether he could trade his land for some of DeLarm's bonds, if they had thought DeLarm was a fraud and his bonds valueless? Counsel attempts, from this letter, to draw the inference that the Kilbournes were in a conspiracy with DeLarm to defraud Glover out of his lands and afterwards get it themselves. Judge Bean, however, drew the same inference that we did—that it was evidence of the Kilbournes' honesty and belief in DeLarm and the bonds. The presumption is always in favor of innocence. Man after man—substantial business men of Seattle—went on the stand and testified to the long-standing uprightness and good character of the Kilbournes. Is it supposed that men of that character would write the Glover letter with the intent in mind which the Tobeys' counsel attributes to them; especially since they must have known that if they had done so they would be liable to a criminal prosecution for using the mails of the United States to defraud? Again, as an evidence of their good faith, if they had been scheming with DeLarm to defraud the Tobeys, would they have taken the deeds from the Tobeys direct to themselves? No, they



would have had the Tobey's deed to DeLarm or somebody else who could act as a buffer and then had that person deed to them. The very act of paying DeLarm the ten thousand dollars cash to be released from the construction of the second unit shows their complete innocence. Counsel says that all the consideration must pass from an innocent purchaser before he has notice of any fraud and says that the Kilbournes' failure to testify that they had no notice of any fraud before all the consideration passed, raises the presumption that they did have notice. As a matter of fact, they have testified on the point plentifully, as we shall hereafter show. But better than mere words are their acts, among them the payment of this ten thousand dollars. If the Kilbournes had thought at any time that DeLarm had defrauded the Tobey's and that therefore the title to the Tobey lands might be attacked, do your Honors suppose that when DeLarm came to them and asked them to pay him ten thousand dollars to release them from the construction of the second unit, they would have accepted his offer? On the contrary, they would have said: "Mr. DeLarm, we have learned of your fraud. The title to the land which you gave us in payment for all our work and services and for the construction of this second unit is tainted with fraud and if we complete that second unit for you now, with notice of the fraud, the loss would be on us. You have cheated the Tobey's and in doing so you have cheated us and we stop right here, and you can whistle for your second unit as far as we are concerned." That



would have been the answer they would have made if they had known or suspected DeLarm of fraud. Instead of that they had the utmost confidence in the man and paid him ten thousand dollars to be released. Counsel will say: "Yes, but they got that money by placing a second mortgage on the Tobey land." True enough they did, but they are nevertheless personally liable on the mortgage notes just the same.

Why, way late in January, 1912, only a few days before DeLarm's exposure; to be exact, on January 25, 1912, long after all consideration had passed from the Kilbournes to DeLarm, they made an agreement with him that on payment of the seventy-five hundred dollars on the Puget Sound Bridge & Dredging Company account, with one thousand dollars attorneys' fees, and the twenty-seven hundred dollars which the Moran Company account then amounted to, they would have the Dredging Company satisfy and cancel of record the lien on the pumping plant which the Dredging Company had reduced to judgment, and would also surrender the Tacoma properties which the Kilbournes held as security for these amounts. <sup>Def. Ex. W. p. 687.</sup> In other words, they were still proceeding on the lines of the original agreement, which does not look as if they had received notice of fraud. If they had received such notice, with the consequent knowledge that the Tobeys would probably try to take their lands back, is it likely that the Kilbournes would have made this agreement? Hardly. The Dredging Company's lien amounted to something

over twenty thousand dollars, and while the Kilbournes, as honorable men, would have paid the Dredging Company because they had agreed with the Dredging Company to be responsible to them, they would certainly not have been ready to release DeLarm from the lien on the payment of such a small sum as seventy-five hundred dollars. They would have maintained the lien to the last, so that on being subrogated to the Dredging Company's rights they could have some protection, and they would have held on to the Tacoma securities for the same reason.

APPELLANTS'  
POINT VII.

“The burden is upon one claiming to be a *bona fide* purchaser to prove payment in full before notice.”

True as a general statement, and we have proved it so fully that any discussion of this point of law seems superfluous. We might suggest this comment, however; there is always the equitable consideration of what amounts to full payment. What is *full* payment? If it be cash, the answer is easy; but suppose it to be services requiring the purchase of animals and tools, and transporting of men, and opening of a camp, and the engaging of experts—such as an engineer—would a court of equity say that all this must be abandoned, great loss sustained, and suits for breach of contract with others endured, merely because at some point in the proceeding notice of a fraud is given? It is equity's boast that it

is synonymous with justice and with good sense, and proceeds in each case to do the equity demanded.

Counsel's statement of the law needs this further modification, that where an innocent purchaser has paid part of the consideration before notice, and completed the remainder of it after notice, he must be reimbursed for that paid before notice by the parties seeking cancellation; or, as some cases have held, he may retain the lands and the plaintiff's remedy is confined to a recovery of that portion of the purchase money which was still unpaid when notice was given. Pomeroy's Equity (2nd ed.), Sec. 750. We think the testimony shows that the Kilbournes paid the entire consideration and completed the Wahluke pumping plant and were released from installing the second unit—before any notice of fraud.

APPELLANTS'  
POINT VIII.

“One who takes as security of, or in payment of a pre-existing indebtedness, does not take for a good consideration.”

True in some jurisdictions, not in others; but it has no application whatever here. The Kilbournes did not take the property as security, nor in payment of a pre-existing indebtedness. The preliminary negotiations were that the land should be taken as security for the DeLarm corporation's debt to the Kilbourne & Clark Company, but in the final deal the Kilbournes as individuals *assumed a new obligation*—the forty-three thousand dollar debt of DeLarm's corporation to the Kilbourne & Clark

Company—and agreed to complete the plant and to install an additional unit, all of which they did in equitable effect. The questions of security and pre-existing indebtedness were not involved at all.

APPELLANTS'  
POINT XI.

“The failure of the defendants to testify to lack of notice or knowledge prior to the performance of their contract to complete the pumping plant, and prior to their release from their contract to install the second unit, warrants a presumption of notice.”

The Kilbournes' entire lack of knowledge, both from all their testimony taken as a whole and from the acts which we have before referred to as indicating their innocence stronger than any words could do, is so clear that we almost feel like ignoring this point. Just to show, however, that counsel's statement that the Kilbournes were silent on this point is an unwarranted assumption, we quote the following:

E. C. Kilbourne said that the irrigation project was perfectly feasible; was all the time; that he had great confidence in the proposition and has today, and added, “I paid no attention to the bond issue whatever except on the early start, the very first proposition. The question of bonds came up through the conversation in which he (referring to DeLarm) said that the bonds of the company would be \$300,000, were practically sold in the East. That is when Mr. Kilbourne and myself were investigat-



ing their resources" (p. 404). E. C. Kilbourne also said that, at the end of May, 1911, when he wrote the Glover letter, he thought the bonds were perfectly good, his testimony being as follows (pp. 436 and 437) :

"Q. Now, at the time, May 27th, or the end of May, at the time you wrote this letter, did you believe those bonds good?

A. Yes.

Q. Why did you think they were good?

A. Because we had practically completed the pumping plant then, Fox was about through with the ditch, well along with it, and it looked as though things were going to be all right.

Q. You thought water would be in the ditch?

A. Yes, sir; we had then the machinery all in.

Court: Did you know how many bonds had been issued?

A. I supposed \$300,000.

Court: That is what you thought when you wrote this letter?

A. Yes, sir, \* \* \*."

C. A. Kilbourne said: *ff 506-507*

"Q. Mr. Kilbourne, did you or your company, directly or indirectly, have any connection with DeLarm and his projects other than your corporation was to build this pumping plant?

A. Never in any way, shape or manner. We knew nothing whatever of his inside affairs.

Q. Did you ever have any of these bonds offered you in payment?

A. Never presumed to offer us any bonds at all. He knew that we would not be able to carry bonds, couldn't take our pay in that way, and he never offered them.

Q. Did you know anything about the bonds or the value of them, and if you knew anything



state what it was and what your own belief was.

A. I knew nothing about the value of the bonds. I knew they had a good proposition and supposed there was \$300,000 authorized, and that the property ought to be perfectly good for that issue."

And again he said, on cross examination (p. 522) :

"Q. Didn't you know then, Mr. Kilbourne, up to the time that the thing collapsed, that is, during the pendency of it, the latter part of it, that they were unable to negotiate their bonds for money, either there in Seattle, or anywhere else?

A. No, I didn't know they were not able to. I knew they hadn't sold any so far for cash; that is, that I knew of. They may have sold some, but I mean to say, it hadn't been reported to me, and they still owed us money."

And again, on cross examination, he said, referring to DeLarm :

"Up until January, 1912, I really believed the fellow was sincere and honest and would carry out his scheme" (p. 532).

We only mention these brief extracts from the testimony because of counsel's statement that the Kilbournes did not testify on this point.

Further, the Kilbournes, in their affidavit opposing an interlocutory injunction, which affidavit has been introduced by the Tobeyes as plaintiffs' exhibit 151, p. 653, said :

"I, E. C. Kilbourne, and I, C. A. Kilbourne, now say, each for myself, that at no time was

I in the confidence of either the Tobeys or DeLarm, or anyone connected with them; that I had no knowledge of DeLarm's financial condition other than as given to me by DeLarm and as in a general way I knew from my acquaintance with the Wahluke irrigation project which, as already stated, seemed to me under proper handling to have the conditions for success."

The questions of fact which counsel has discussed in his brief we have not touched on. We take issue with counsel's analysis of some of the facts; particularly to his analysis of the consideration that passed from the Kilbournes to DeLarm, found on pp. 51 to 53 of his brief; but we are satisfied to have your Honors glean the facts from your own reading of the record without our prolonging this brief with a discussion of them.

One point we touch briefly. Counsel says that the Kilbournes never paid DeLarm's debt ~~on~~ <sup>of</sup> forty-three thousand dollars to the Kilbourne & Clarke Company which the Kilbournes, as individuals, assumed and agreed to pay. As a matter of fact the Kilbournes themselves were the principal stockholders in the company and the company went out of active business at the end of 1910. The company owed C. A. Kilbourne seventy-three thousand dollars (p. 492), and also owed E. C. Kilbourne an amount which is not stated (p. 496). In winding up the affairs of the corporation it is apparent that with the amounts due to the two Kilbournes, as individuals, which far exceeded the forty-three thousand dollar obligation which they assumed to pay the

corporation, such payment would be a mere matter of bookkeeping and striking a balance.

In conclusion we desire to remind your Honors of the great advantage that the trial judge has in hearing the witnesses face to face, and that it has always been recognized that the trial judge's decree should not be disturbed unless your Honors were satisfied from the printed record that his decree was wrong. We think that rule should be more strongly adhered to than ever in an appeal like this, brought under the new equity rules, where the testimony is not even before your Honors *verbatim*, but only in a condensed paraphrase.

Respectfully submitted.

C. E. S. WOOD,

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Proctors for Appellees. b















